ANALYTICAL INDEX.

The Robert Clarke Company, Printers, Cincinnati. [*February, 1899.*

Supreme Court of the United States.

OCTOBER TERM, 1898.

David Armstrong, Receiver of the Fidelity National Bank of Cincinnati, Ohio,

Appellant.

No. 279.] *vs.*

The Chemical National Bank of New York,

Appellee.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR APPELLEE.

(The references to the Record here made are to the paging as given in the margin—that of the original transcript.)

HISTORY OF CASE.

This cause originated in a bill in equity filed by the appellee in the Circuit Court of the United States for the Southern District of Ohio, Western Division, against the appellant to establish a claim against the Fidelity National Bank arising from a loan of money secured by collateral (Rec., pp. 3–7). The answer first filed by the defendant (Rec., pp. 9–12) practically admitted the making of the

loan, but contended that the collateral should first be credited thereon and the claim established for the balance only, and alleged an offer to allow the claim provisionally for the balance remaining due after applying collections that had or should have been made from the collateral, without prejudice to the right of the plaintiff to sue for the balance. Exceptions having been made (Rec., pp. 12–15) and sustained (Rec., pp. 15–16) to this answer, an amended answer was filed (Rec., pp. 17–20) which denied the making of the loan, and contended that if it were made the collections from the collateral should be credited, and the claim established only for the balance. A replication was then filed (Rec., pp. 20–21); and upon these pleadings the evidence shown in pages 21–117 of the Record was taken, and the cause submitted to Judge Sage. His opinion at this hearing was omitted by stipulation (Rec., p. 1, paragraph 9) in making up the present transcript; but it will be found in 50 Fed., 799–809; with which should be read a memorandum prepared by him as to the form of decree and printed at Rec., pp. 117–118. A decree was entered in conformity with these opinions, which contained also an order made by consent that the original defendant should pay to the original plaintiff $100,000, without prejudice to the rights of either party upon the appeal, with provision for restitution in case it should be found that that sum exceeded what was due. From this decree both parties appealed; and as it was vacated on that appeal, it, as well as the assignments of error and appeal bonds thereon of the original plaintiff, were also omitted in making up the present transcript (Rec., p. 1, paragraphs 10–12); the assignments of error and appeal bonds of the original defendant will be found at pp. 118–120 of the Record.

On the appeal, as well as in the court below, the val-

idity of the loan was not seriously contested, the argument being addressed to the other questions involved. The Circuit Court of Appeals (Mr. Justice Brown and Circuit Judges Taft and Lurton) held that dividends should be paid upon the indebtedness as it stood at the date of insolvency without deduction because of the collaterals; the opinions rendered are also omitted from the transcript; they will be found in 16 U. S. App. 465; 59 Fed. 372; 28 L. R. A. 231. The Chemical National Bank then filed a petition for rehearing to correct an error into which the Court had fallen, as was conceived, with reference to the computation of interest. While this was pending the the opinion of this Court in *Western National Bank* v. *Armstrong*, 152 U. S. 346, was pronounced; and thereafter the present appellant also filed a petition for rehearing upon the question as to the validity of the loan. These petitions having been granted and the cause reheard, the Court (Circuit Judges Taft and Lurton and District Judge Severens) found that, in view of the decision of this Court just referred to, it was proper that each party should have an opportunity to introduce further evidence "on the issue whether the alleged loan created any liability against the Fidelity Bank at all"; and they, therefore, reversed the decree and remanded the cause with instructions to receive such evidence; and if, upon all the evidence, the issue as to the validity of the loan was decided in favor of the present appellant, to decree restitution of the $100,000 and dismiss the bill; and if decided against him, to enter a decree directing the Receiver to allow the claim in the amount due thereon at the date of the insolvency of the Fidelity Bank, and to pay dividends thereon as to other creditors, with interest from the presentation of the claim upon dividends theretofore declared, and from declaration as to those declared thereafter, crediting the $100,000 as a

partial payment; their opinion and the decree based thereon have also been omitted from the transcript; but the mandate, which set out the decree, will be found at pp. 323–324 of the Record, and the opinion is reported in 31 U. S. App. 65; 13 C. C. A. 47; 65 Fed. 573, and 28 L. R. A. 239.

Additional evidence was then adduced by both parties and the cause again submitted to Judge Sage, who found the issue defined in the mandate for the plaintiff, the present appellee (Rec., p. 307), and entered a decree accordingly (Rec., p. 318). The opinion of Judge Sage is also reported in 76 Fed. 339.

From this decree the defendant appealed (Rec., pp. 320-322). The appeal was heard by Circuit Judges Taft and Lurton, and District Judge Severens, and the decree below was affirmed (Rec., p. 328). The opinion of that Court, announced through Judge Taft, will be found on pp. 330-354 of the Record, and also in 54 U. S. App. 462; 27 C. C. A. 601; 83 Fed. 556.

From that decree the defendant has now appealed to this Court (Rec., pp. 356-364).

ERRORS ASSIGNED.

It will be found by pp. 358 and 359 of the Record that nine errors have been assigned.

Of these the first, second, and eighth are in legal effect identical, and go to the correctness of the conclusion reached by Judge Sage on the issue remanded to him after the first appeal to the Circuit Court of Appeals, as to the validity of the loan.

The third, fourth, and sixth go to the question as to how dividends should be computed upon a loan secured by collateral; the third contending that collections made upon the collateral should be credited upon the loan and divi-

dends computed upon the balance; the fourth that a collection lost by negligence is to be treated as if made; and the sixth that all collateral must be exhausted, and their proceeds credited before a dividend can be declared.

The fifth is a combined assignment embodying in effect all of the others just mentioned.

The seventh goes to the computation of interest upon dividends declared before the claim was established by adjudication. As printed, it contains an error which makes it senseless.

And the ninth is merely a general assignment of error in affirming and refusing to reverse.

The first, second, and eighth of these assignments are predicated upon the decision of this Court in *Western National Bank* v. *Armstrong*, 152 U. S. 346, and assume that the case at bar is not distinguishable from that case. We dispute that assumption; and it was negatived by the Court below. We shall hereafter point out in detail the differences between that case and this; differences so manifest and so broad as to prevent the decision there from being applicable here.

But we should fail in our duty to the profession, and to this Court, if we did not here and now, when the authority of that case is invoked, respectfully but earnestly request the Court to reconsider its opinion there pronounced. The briefs there submitted do not discuss the question decided by the Court; and we are credibly informed that it received as little discussion orally at the bar. Possibly to this is owing the assumption, apparent in the opinion, that the borrowing of money is not only not part of the business of banking, but so foreign to it as to be questionable in exercise and sustainable, if at all, only by special action of the board of directors.

We expect to establish to the satisfaction of the Court

that this assumption is a mistake; that the business of banking sprang from the borrowing of money, and through borrowing only it lives and thrives. The evidence we shall adduce to the Court upon this subject sheds such a different light upon it from that in which it was evidently viewed in the *Western National Bank case* as to alter totally the impression it makes upon the mind. In the light of that evidence, we repeat, we shall request the Court to reconsider the language used in that decision, and determine whether that language shall stand as the final expression of the views of this Court upon this important subject. And in that connection we respectfully submit the strong and courageous language recently used by the Supreme Court of Indiana in *Evansville* v. *Senhenn*, 41 L. R. A. 728 (not yet officially reported), viz.:

"While it is the policy of the law not to depart from decisions previously made by a court of last resort, yet the same law does require such departure where adherence to such decisions would be productive of more evil than the departure therefrom, and the establishment of the better and sounder rule."

With this explanation of the reason why we here discuss borrowing as a part of banking as if a question of first impression in this Court, we proceed to a statement of the case at bar.

STATEMENT OF FACTS.

The opinion of the Court below contains a very full statement of the facts and some of the evidence shown by the present record (Rec., pp. 331–342). That statement we commend to the attention of the Court. Passages here given in quotation marks are taken from it unless otherwise specially noted; and our only reasons for departing

from or attempting to enlarge upon it, are that we may refer the Court to the parts of the record where can be found the evidence in support of the facts stated, and that we may give some of the facts in greater detail and in a little different order than they were presented by the Court below. References to the pages of the record in the passages quoted are ours, as the Court below of course did not give such specific reference in its opinion; but we have thought it not out of place to refer this Court to the items of evidence supporting the facts as stated by the Court below.

The internal management of the Fidelity Bank. "E. L. Harper was a director, Ammi Baldwin was cashier and Benj. Hopkins was teller of the Third National Bank [of Cincinnati]. While occupying these positions they had been engaged together in wheat gambling, and had been charged with misconduct in the management of that bank in connection with the gambling. (Rec., pp. 174–176, 285.) In February, 1886, Harper and others organized the Fidelity Bank, and the bank opened for business March 1st. Harper took [in the names of himself, Mathews and Gahr] (Rec., pp. 302–305) more than one-quarter of the stock. He was elected vice-president; Baldwin, cashier, and Hopkins, assistant cashier. Shortly after organization a committee of the directors investigated the charges concerning Harper, Baldwin and Hopkins, made by Hearne, then president of the Third National Bank, but the directors declined to hear the report. Alter, a director, who wished to read the report, made himself still more obnoxious by asking to see the call-loan account, but access to it was denied him. (Rec., pp. 172–173.) The directors held four meetings in 1886—one in February to elect officers, the second in May to appoint a committee to draft by-laws, the third in August to approve the by-laws, and the fourth a special meeting to vote a dividend. (Rec., p. 156, Q. 3; pp. 246–255.) No other business was done by the directors during that year, and Harper managed the bank without the slightest supervision of any kind. At the annual

election [in 1887] Alter was dropped as a director, and of the nine elected (Rec., p. 256), Harper, Baldwin and Hopkins, Mathews, Harper's brother-in-law, and Gahr, his confidential secretary, constituted a majority. Mathews and Gahr, were, confessedly, Harper's puppets in the board. He gave them ten shares each to qualify them, and then each also held a large amount of stock in his name, which belonged to Harper. Mathews was first elected in February, 1886, and resigned to allow some one else to be elected in his place. (Rec., p. 247.) He was re-elected in January, 1887, to take the place of Alter and remained in the board to the end. The explanation of his position in the board, and of that of Gahr, is seen by the following question and answer. (Rec., p. 237, XQ. 3.)

"*Q.* Mr. Mathews, you said something a little while ago off the record, which did not go down in the stenographic report—something about your directorship being nominal. Will you explain what you meant by that?

"*A.* Yes, sir, It was understood between Mr. Harper and me—and I think the same is true as to Mr. Gahr—that we were to be directors only until others were found to take our places; and, in explanation, I will say that one time Mr. Harper told us that one of us would have to step out—that one of us would have to resign as director to allow somebody else to supply the place—and I know Mr. Gahr and I tossed coppers to see which of us would withdraw."

"Mathews was not only Harper's brother-in-law, but he was one of the executive officers of Harper's corporations—the Riverside Rolling Mill Company, Swift's Iron and Steel Works, and E. L. Harper & Co.

"In January, 1887, Harper and Hopkins entered upon a comprehensive scheme of wheat gambliag, and Baldwin was accessory thereto. In carrying out their plan, Harper raised money by discounting, with the funds of the bank, the paper of E. L. Harper & Co., Swift's Iron and Steel Works, and the Riverside Rolling Mill Company, in all of which companies he was the controlling member, and also by cashing the checks of these companies and carrying the checks as cash on the books of the bank. This was done

with the knowledge and connivance of Mathews, the director. In these ways Harper consumed of the money of the bank, between January and June, $750,000. (Rec., pp. 271–285.) The daily discounts were recorded in a book, which was open to the inspection of the directors. Kineon, one of the directors, repeatedly called the attention of Swift, the president, to the large discounts in favor of Harper's companies and objected to it. Swift reported the matter to Harper, who said that if Kineon ran the bank he would keep all the money in the bank. Swift called Kineon's attention to Harper's large credits, and Kineon wanted to know where he got them. No further investigation or inquiry was made, however, until Kineon's resignation, hereafter described. (Rec., pp. 179–180.)

"Harper's brokers in the wheat deal were Wilshire, Eckert & Co. He advanced, from the funds of the bank to that firm, on their notes and by cashing their checks and carrying the same in cash, a million and a half dollars, to be expended for his benefit in buying wheat on the Chicago market. (Rec., pp. 272–273.) He advanced, from the funds of the bank by way of discounts, to Whitely, Fassler & Kelly, a firm who were interested in the wheat deal, $375,000. (Rec., pp. 279–281.) He borrowed in February and March, 1887, in the name of the Fidelity Bank, from the First National Bank of New York, $400,000, used $113,000 of the Fidelity Bank's bills receivable in so doing and had $400,000 transferred to his credit on the books of the Fidelity Bank, without exhibiting any written evidences of his right to such credit. (Rec., pp. 206–207, 213–219.) He borrowed in the name of the Fidelity Bank, from the Chemical Bank, the $300,000 here in controversy, in March, 1887, and forwarded as security $146,000 of the bills receivable of the Fidelity Bank. In June, 1887, in order to tide over the stress in which the bank then was, he borrowed from the Chemical Bank about $1,000,000,* and transferred to that bank bills receivable of a greater value. He did this without any action by the

* An inadvertent error as to the amount borrowed; see p. 19 *infra*.

board of directors. During this period of less than six months over which these transactions extended, the board of directors held five meetings—one meeting in January to elect officers, another in February to approve of Harper's purchase of $340,000 in Government bonds to qualify the bank as a United States Government depository. These bonds were bought from the First National Bank of New York, and as a part of the contract of purchase that bank agreed to lend the $400,000 already spoken of (Rec., pp. 213–214), but it does not appear that this was known to the directors. The third meeting was held in March to declare a dividend; the fourth in March to vote an increase of stock, and the last in May, when Kineon, a director, demanded that the bills receivable be examined. Harper objected, and told Kineon he ought to resign. Kineon said he would if Harper would buy his stock, which Harper then did. (Rec., p. 181.) A committee of directors was then appointed to examine the bills receivable, but no record is made of its reporting. No other business was done by the directors than has been stated. (Rec., pp. 256–259.)

"The by-laws of the bank provided for monthly meetings, but during the year 1886 five meetings failed for want of a quorum. The by-laws provided that the president, vice-president and cashier should have power to discount and purchase bills, notes and other evidences of indebtedness, and to buy and sell bills of exchange, and to sign all contracts, drafts and checks. The cashier was made responsible for all the moneys, funds and valuables of the bank and was required to deliver the same to the order of the directors. The president and vice-president were made responsible for all sums of money and property entrusted to them or placed in their hands by the cashier. The last by-law expressly forbade the carrying of checks or other memoranda as cash, but required them to be entered upon the books as call loans. (Rec., pp. 250–252.) In spite of this, Mathews, one director, was privy to the carrying of $400,000 for several months in this way for Harper's accommodation. The president, Briggs Swift,

and Chatfield and Moorehead, directors, were also accommodated in this way. Watters, the general bookkeeper, testifies that from the beginning to the end of the bank, the entries of cash upon the book were false, because of these so-called cash items (Rec., pp. 211–212); and Hinsch, the assistant receiving teller, testifies that nothing was carried as a cash item except upon Harper's order." (Rec., p. 177, Q. 8.)

The whole situation was correctly summed up by the appellant in sec. 20 of the bill brought by him against the directors for redress because of their misfeasance and nonfeasance, quoted *infra*, p. 24. Harper was suffered to conduct the affairs of the Fidelity Bank as he thought best. If any director ventured to inquire or to comment, he was forthwith suppressed (Rec., Alter, pp. 172–176, QQ. 6–16, RDQQ. 20–26; RRDQ. 27; Hinsch, p. 176, QQ. 4–6; Kineon, pp. 178, 181, QQ. 6–9, 26–28; Gahr, p. 203, QQ. 8–11; Watters, p. 235, XQQ. 53–62; Pogue, p. 244, XQQ. 1–12). For all practical purposes Harper was the bank, so far as persons dealing with it were concerned.

The relations between the Fidelity and Chemical Banks.— The dealings between these banks began with the opening of the Fidelity Bank, March 4, 1886, and continued till it closed its doors on June 21, 1887 (Rec., Quinlan, p. 38, QQ. 95–97). The banks made collections for each other, and in addition, the Fidelity made the Chemical the authorized New York depository for its reserve, and kept an ordinary deposit account there. In short, the Chemical was the New York correspondent and reserve bank of the Fidelity. (Rec., Quinlan, p. 30 *et seq.*, QQ. 3–8, 53, 54.) The usage between the banks was for the Chemical Bank to balance the account on the first of each month, and to send to the Fidelity Bank an account current showing the transactions for the preceding month since the last balance,

just as a bank periodically writes up, balances, and returns its depositor's pass book; the Fidelity Bank checked off this account with its own books, noted on a sheet called a reconcilement sheet all entries that were not identical; noted on the back of this sheet in detail all drafts drawn upon, but not yet presented to the Chemical, as shown by its account; reconciled the differences as far as an examination of their own books and papers would explain; and then wrote to the Chemical Bank for explanations as to the remaining discrepancies, mentioning them item by item, and generally requesting a return of that letter with the explanations noted thereon; this request was complied with by the Chemical, and occasionally other letters were sent, giving further explanations as to matters not fully investigated when the Fidelity's letter was returned. (Rec., Quinlan, p. 32, Q. 31; Watters, p. 224, QQ. 1, 2; pp. 228–233, XQQ. 1–38; Firth, pp. 139 *et seq.*)

On February 28, 1887, Harper, vice-president of the Fidelity Bank, mailed at Cincinnati to the cashier of the Chemical Bank in New York a letter, of which the following is a copy (Rec., p. 21):

"BRIGGS SWIFT, *President.* E. L. HARPER, *Vice-President.*
AMMI BALDWIN, *Cashier.* BENJAMIN E. HOPKINS, *Ass't Cashier.*

United States Depository.

THE FIDELITY NATIONAL BANK.

Capital, $1,000,000.00.

CINCINNATI, *February* 28, 1887.

Wm. J. Quinlan, Jr., Cashier Chemical National Bank, New York City:

Dear Sir: Enclosed herewith we hand you for credit our certificate of deposit No. 345 for $300,000, with bills as collateral, as follows: (Then was set out a list of twenty-seven notes, aggregating $326,000.) We desire to keep a large reserve with you, and we trust you will make the rate

as low as you proposed some time since. Please place the amount to our credit and advise the rate.

Respectfully yours,

E. L. HARPER, *Vice-President.*"

The certificate of deposit inclosed was as follows (Rec., p. 22):

"This certificate is not subject to check, but must be presented to draw money.

THE FIDELITY NATIONAL BANK.

No. 345.

CINCINNATI, *Feb.* 28, 1887.

E. L. Harper has deposited in this bank three hundred thousand dollars ($300,000.00) payable to the order of himself on return of this certificate in current funds.

$300,000.00. AMMI BALDWIN, *Cashier.*

Endorsed: E. L. Harper."

This letter of February 28th was not copied into the letter-press copy books of the Fidelity Bank.

The letter reached New York on March 2d, and upon that day Quinlan, cashier of the Chemical Bank, wrote and mailed the following letter (Rec., pp. 31–33):

"NEW YORK, *March* 2, 1887.

A. Baldwin, Esquire, Cashier:

Dear Sir: Your favor of the 28th inst. has been received. We credit Fidelity National Bank $300,000, and shall be considerate as to rate of interest when the loan is paid. . . . WM. J. QUINLAN, *Cashier.*"

Upon the books of the Chemical Bank was entered, on March 2d, this credit in favor of the Fidelity Bank (Rec., p. 32. Q. 27):

"Fidelity temp. loans, ... $300,000."

The letter just mentioned was the only advice of the loan sent by the Chemical Bank, until its March account

current was transmitted in April, and could not have reached Cincinnati by due course of mail before March 4. But in the meantime, on March 2, the bookkeeper of the Fidelity Bank, under instructions from Harper, had given Harper personally credit in that bank for $300,000, and had charged the Chemical Bank with the same sum. (Rec., Watters, pp. 73–74, QQ. 20–26.)

Of the collateral sent at that time, $146,695.30 belonged to the Fidelity Bank (Rec., p. 75, QQ. 35, 36). The residue comprised four notes made by J. W. Wilshire, and indorsed by J. V. Lewis, each for $25,000, which were accommodation paper executed and given to Harper for discount in furtherance of his wheat deal, the proceeds to be placed to the credit of Wilshire, Eckert & Co. (Rec., pp. 57–58); two made by Swift's Iron & Steel Works for $25,000, each; and two by the Riverside Iron & Steel Works for $15,000, each. The record contains nothing as to the circumstances under which these latter notes were made; but it does appear that Harper, who was the controlling spirit in each of these concerns, used their paper freely to further his wheat deal.

On the stub of certificate No. 345, in the certificate of deposit book then in use in the Fidelity Bank, is written the word "canceled" (Rec., Watters, p. 78, XQ. 54), and the only entry made on that book which can relate to this transaction is on the stub of certificate No. 497, which records the issue of a certificate to E. L. Harper, without date, for $300,000 deposited by himself; the stubs of Nos. 496 and 498 are dated, respectively, May 17 and May 21 (Rec., Watters, p. 72, Q. 9). The bookkeeper of the Fidelity Bank testifies he knows of no paper or obligations given by Harper to the Fidelity Bank at the time of the issue of that certificate, and that

ultimately his checks drawn were sufficient not only to exhaust this $300,000, but several hundred thousand dollars besides (Rec., pp. 74, 83; QQ. 27, 106–108); but it is not shown that Harper did not have $300,000 to his credit on February 28, 1887, nor what entries, if any, were made in his personal account at or about that date other than the one above mentioned; and it does appear that the amount constantly standing to Harper's credit was so large as to be a cause of gratification to the president of the bank (Rec., pp. 179–180, 182; QQ. 16, 17; XQQ. 13–15). It is quite consistent with the other facts appearing in the record that Harper may actually have had $300,000 to his credit on February 28, 1887, when this certificate of deposit was drawn; and it is not without significance in this connection that the bill of complaint subsequently filed by the receiver against the directors (Rec., pp. 271–289), though charging them for suffering many specific irregularities of Harper, does not charge that he caused this certificate of deposit to be issued without having funds then in the bank to answer for it, nor does it charge that his personal account was ultimately overdrawn.

Shortly after the first of April, 1887, the Chemical Bank sent to the Fidelity Bank its statement of account for the month of March as usual; upon this, under date of March 2, appeared a credit to the Fidelity Bank, as follows: "Tem. Loan, $300,000." The account starts on March 1st with a balance in favor of the Fidelity Bank of $24,360.65, and ends on April 1st with a balance against it, notwithstanding the above credit, of $32,675.97. The account was received by the Fidelity, turned over to Watters, the general bookkeeper, checked up by him with the books of the Fidelity Bank, found to be O. K., and filed away with the archives of that bank. (Rec., Watters, p. 47; QQ. 48–49,

and Exh. 10.*) The usual reconcilement sheet was made out, showing the discrepancies between the books of the two banks. (Rec., p. 259.) Whether any letter was sent relating to the reconcilement is not known; no such letter can now be found in the Fidelity Bank files, where it would naturally be because returned with the answer on its face (Rec., McCauslen, pp. 158, 162; QQ. 16–22, 48–49; Watters, pp. 224, 229; QQ. 2–10; XQQ. 8–17); nor is there such a letter, or trace of any answer to it, among the papers of the Chemical Bank (Rec., Quinlan, p. 122; QQ. 3–6). The probability is, however, that such a letter was written, for the reconcilement sheet for March shows sundry items of difference; and the letter of the Chemical Bank to the cashier of the Fidelity Bank, dated May 11, 1887 (Rec., p. 269), refers to items appearing both upon the March account and the March reconcilement sheet, and is evidently an answer to inquiries as to those items. But whether such a letter was written or not, it is certain the loan of $300,000 was never disputed, nor was the accuracy of the entry of that loan reported by the Chemical Bank ever challenged or referred to. This is certain because: (1) No reference to this matter appears on the March reconcilement sheet, on which all differences were first noted; and (2) from the testimony of Watters, who says that, misled by the identity of the figures of the loan with those on the Fidelity's books for the transfer of funds directed by Harper, he checked off the items as corresponding, and needing no further investigation. At the same time, he admits, and could not but admit, that the items were not identical, and that the entry on the statement furnished by the Chemical Bank signified clearly and distinctly a loan by that bank

* This Exhibit was omitted by inadvertence from the original transcript; it has since been certified by stipulation, and printed separately, to be attached at the end of the main record.

to the Fidelity Bank, and nothing else. (Rec., Watters, pp. 226, 233; QQ. 12–16; XQQ. 39–40.)

On April 24, 1887, one of the bills receivable sent to the Chemical Bank as collateral fell due—a note by the Jung Brewing Co. for $10,000; and as that day was Sunday, was paid to the Fidelity Bank on April 23. (Rec., Watters, p. 83, QQ. 109–113.) This note had been returned from the Chemical Bank probably on April 19; its proceeds were never remitted back. (Rec., Quinlan, p. 39, XQ. 109; we take it the statement there, "returned May 19," is a mistake in reading the entry when the deposition was taken.)

The account for the month of April, 1887, having been sent by the Chemical Bank early in May, a reconcilement sheet was made for that month as usual (Rec., p. 261); and on May 12 a letter was written by the Fidelity, calling attention to the matters of difference needing adjustment, which was returned on May 19, 1887, with the answer written thereon. (Rec., p. 263.) Meantime, on May 11, the letter above referred to had been sent by the Chemical Bank, referring to differences in the March account (Rec., p. 269); and on May 18 another letter had been sent by it in partial answer to the Fidelity Bank's inquiries of May 12. (Rec., p. 269.)

On May 19th the following telegram was sent to the Chemical Bank (Rec. pp. 27, 37–38; QQ. 89, 90):

"CINCINNATI, *May* 19, 1887.

To Chemical National Bank, New York:

We send other bills to take place. Will want all returned here without presenting, as we advised parties to arrange payment here. FIDELITY NATIONAL BANK."

On May 20th Harper wrote and mailed the following

letter on the letter head of the Fidelity Bank (Rec., pp. 27, 38; QQ. 92–94):

"*May* 20, 1887.

William J. Quinlan, Jr., cashier, New York.

Dear Sir: Please do not present any of the collateral paper for payment. We have advised parties we would order back and charge up here. We will to-morrow send you new notes to take place of ones maturing. We will pay the loan July 15th, and will pay interest till that date, if agreeable to you. Yours truly,

E. L. HARPER, V. P."

On May 21st Harper wrote and mailed the following letter, also on the letter head of the Fidelity Bank (Rec., pp. 23; 29, QQ. 40–45):

"CINCINNATI, *May* 21, 1887.

Chemical National Bank, New York City.

Gentlemen: Enclosed herewith we hand you to hold as collateral the following bills: (Then follows a list of twenty-one notes, aggregating $230,592.46.)

Will you kindly return to me the following: (Then follows a list of nineteen notes of those forwarded in his letter of February 28th.)

We will pay the loan July 15, 1887, if agreeable to you, and will pay interest now to that date.

Respectfully yours,

E. L. HARPER, *Vice-President.*"

The substitution of collateral was effected in accordance with this request.

Of the collateral returned $92,495 belonged to the Fidelity Bank; the residue, aggregating $105,000, comprised the notes of Swift's Iron & Steel Works, and of the Riverside Iron & Steel Works, and one of the Wilshire notes above alluded to. None of the substituted collateral belonged to the Fidelity Bank. (Rec., p. 76, Q. 40.)

This left the collateral remaining with the Chemical

Bank as shown in Exhibit A attached to its bill of complaint (Rec., p. 7), amounting in the aggregate to $334,382.39; and of this only $19,200—four notes of the Champion Machine Company, one for $4,500 maturing July 24, one for $5,200 maturing July 28, one for $5,000 maturing August 3, and one for $4,500 maturing August 20, all in 1887—belonged to the Fidelity Bank.

The account for the month of May was forwarded by the Chemical Bank, checked and reconciled by the Fidelity Bank, and a reconcilement sheet prepared, and questions asked thereon and answered, as usual, early in the month of June. (Rec., pp. 264–265.) Later in June the Fidelity Bank requested of the Chemical Bank a further loan, and forwarded as security a little over a million dollars, face value, of bills receivable, upon which the Chemical Bank, on June 17, advanced $200,000 by crediting the deposit account of the Fidelity Bank with that sum as a loan. (Rec., Quinlan, p. 35, QQ. 55–57; p. 105, Armstrong Exh. 6; p. 266, June reconcilement sheet.) The Fidelity Bank suspended payment upon June 21, and at that time was indebted to the Chemical Bank by way of over-draft, after putting to its credit the two loans above mentioned, one of $300,000 on March 2, and the other of $200,000 on June 17, in the sum of $54,938.49. (Rec., p. 105, Armstrong Exh. 6.)

The transactions between Armstrong, as receiver of the Fidelity Bank, and the Chemical Bank.—Armstrong was commissioned as receiver on June 27, 1887 (Rec., Armstrong, p. 85, Q. 2). He seems at once to have taken up the Chemical Bank matter, for on July 6 that bank wrote him, stating specifically the existence of the two loans just above mentioned, and referring to prior correspondence with him (Rec., p. 268). About that time, the account for the June business up to June 20 was forwarded by the Chemical Bank, ex-

amined by Armstrong, and a reconcilement sheet made, and on July 12, a letter was written by him to the Chemical Bank as to differences found on such reconcilement sheet, which was returned with explanations written on its face, as usual (Rec., pp. 266–267). On July 23, and again on August 24, the Chemical Bank advised Armstrong of the payment of two of the notes forwarded as collateral for the March loan (Rec., p. 115, Exh. 6, 7). The Chemical Bank credited these collections and all others upon that collateral, as they came in, to the credit of the account of the Fidelity Bank, and charged that account with the balance of $54,938.49 due on June 20 by way of over-draft as above stated, and with the two loans of March 2, $300,000, and June 17, $200,000, and with sundry other charges, until, on November 26, there appeared a balance to the credit of the Fidelity Bank amounting to $33,809.89, when that balance, with the uncollected collateral or orders therefor, was remitted to Armstrong and the account closed (Rec., p. 115, Watters Exh. 8, 9; p. 35, Quinlan, QQ. 58–65; p. 46, XQQ. 172–183, 200; p. 94, Armstrong Q. 62; pp. 106–111, Armstrong Exh. 7, 8. Mr. Armstrong is mistaken in saying Wilshire's note was not returned; see p. 109, seventh item); this upon the assumption that they had a general lien upon all of the collateral to secure all of the indebtedness. In the meantime, there had been some correspondence between the Chemical Bank and Armstrong upon this matter, which resulted in a letter by Armstrong, dated November 14, 1887 (Rec., p. 24), in which he does not dispute the validity of either of the loans, but does claim that the collateral forwarded in June must be applied solely to the payment of the loan made in that month, and of the over-draft existing after crediting the two loans. To this letter the Chemical Bank responded by two letters, dated November 17 and 18, 1887 (Rec., pp. 100–101), in which

they re-assert their right to a lien upon the entire collateral to secure the entire indebtedness. The letter transmitting the collateral is dated November 25, 1887 (Rec., p. 109, Armstrong Exh. 8). Armstrong answered it by a letter dated November 29 (Rec., p. 111, Armstrong Exh. 9). From the answer, it is evident that the letter transmitted not only the notes there described, but orders for other collateral which had been sent by the Chemical Bank to its attorneys for collection; Armstrong's acknowledgment, as stated in this letter, was without prejudice to his claim previously asserted. Subsequently, by stipulation between Armstrong and the attorney of the Chemical Bank, the residue of the collateral was turned over without prejudice to the rights on either side (Rec., p. 106, Armstrong Exh. 7).

Then followed a suit by Armstrong against the Chemical Bank in the United States Circuit Court for the Southern District of New York, wherein Armstrong sought to recover the surplus of the proceeds of the collateral given in June, 1887, after paying the June loan and over-draft as shown by the bank's books, *i. e.*, with the March loan credited to the Fidelity Bank and unpaid. The Chemical Bank sought to maintain a general lien on all collateral, both March and June, for all indebtedness. Armstrong was successful. (Rec., p. 36, Quinlan, QQ. 73–78.) The decree, rendered in May, 1890, required the Chemical Bank pay him $271,808.34 with interest from May 7, 1890. (Plaintiff's Exh. 7, Rec., p. 26.) The further proceedings in this case are not in evidence; but the opinion of the Court, announced January 2, 1890, may be found in 41 Fed. 234, and 6 L. R. A. 226. On May 22, 1890, the Chemical Bank paid Armstrong the amount due under the decree. (Rec., p. 29.)

Meantime, after the announcement of the opinion of the Court, and shortly after April 3, 1890, the Chemical

Bank presented formal proof of its claim to Armstrong as receiver, asking for an allowance of dividends upon the amount due it at the time of the failure of the Fidelity Bank (Rec., p. 102); to this Armstrong replied by letter dated April 25, 1890, but delivered May 2, 1890, rejecting the claim as tendered upon the ground that collections from collaterals made and to be made should be credited as payments before allowing dividends; and offering to accept a proof for $200,000, and to pay dividends thereon, without prejudice to the right to sue for the balance not allowed, and with the stipulation that should the Court subsequently hold that he was right in his contention, subsequent collections from collaterals should be applied in reduction, and the dividend percentage thereon accounted for by the Chemical Bank to him (Rec., p. 101). This proposition was declined and this suit instituted on May 10, 1890.

Collections by Chemical Bank upon its collaterals. As previously stated, nothing was collected prior to the insolvency of the Fidelity Bank. After that time the Chemical Bank collected at their respective maturities the three notes made by J. W. Wilshire and indorsed by J. V. Lewis, each for $25,000, falling due July 28, August 28, and October 1, 1887 (Rec., p. 37, Q. 79; p. 115, Exhibits 6 and 7). The remaining note of this series, which matured June 28, 1887, is still in its hands and unpaid, no sufficient notice of non-payment having been given to Lewis, the indorser, and the only party to the note then responsible (Rec., pp. 47, 48; QQ. 189–195).

Since this suit was brought the receiver of the Fidelity Bank has accounted to the Chemical Bank for the proceeds of a compromise made by him just previously, and while the securities were in his hands as above men-

tioned, upon the four notes of the Champion Machine Company; the details are not of importance; suffice it to say that as a result the Chemical Bank received in cash on June 2, 1890, $4,481.49; on March 24, 1891, $12.50; and on March 28, 1891, $184.40; and has on hand in addition bonds of Amos Whitely & Co. (successor of the Champion Machine Company) for $2,300, and of Whitely, Fassler & Kelley for $9,600 (Rec., pp. 93–96, 85, 87, 105; N. B., Exh. 5, referred to on p. 105, is printed on p. 87, in answer to Q. 13).

The Chemical Bank also received in March, 1891, $2,917.12 from the trustee for creditors of E. L. Harper & Co., the indorsers upon the fifteen Whitely, Fassler & Kelley notes which were part of the collateral substituted in May (Rec., p. 117). No other cash collections have been made upon the collateral, and what remains on hand may be considered as practically worthless.

Dividends declared to creditors of Fidelity Bank. Dividends to the amount of fifty-eight per cent have been declared to the creditors of the Fidelity Bank as follows (Rec., p. 93, Q. 53; p. 319): October 31, 1887, twenty-five per cent; June 15, 1889, ten per cent; July 30, 1890, ten per cent; August 5, 1891, five per cent; August 15, 1894, eight per cent.

Receiver's suit against the directors. "Armstrong, the receiver, filed a bill against the directors [of the Fidelity Bank on September 18, 1887] to recover compensation for the loss occasioned and made possible by their negligence and failure to supervise Harper's control of the bank. He charged them therein with liability for losses arising from excessive loans made by the bank to Wilshire, Eckert & Co., to Harper's companies, and to Whitely, Fassler & Kelly. He also charged them with permitting Harper, by their negligence, to embezzle more than $500,000, and

from the evidence adduced in support of the averment, it is clear that this charge referred to the transfer of funds by Harper, to his credit, of $700,000, at the time when he had obtained the loans from the First National Bank and the Chemical National Bank of New York. The solvent directors compromised the suit by paying the receiver $450,000, of which Swift, the president, paid $300,000; Chatfield, one director, $100,000; and Pogue & Zimmerman the remaining $50,000. (Rec., pp. 270–301, 206–222.)"

"Armstrong, the receiver, in his bill against the directors, said (Rec., p. 283, § 20):

" 'And complainant further avers that the said E. L. Harper, vice-president of said association, was permitted by the said directors of said bank to manage the affairs of said banking association and to have charge and control of its moneys and assets without any investigation or control of his management of the business of said banking association.'

"Again, the bill averred as follows (Rec., p. 285, in § 23):

" 'Complainant further says that the said E. L. Harper, in connection with the said Ammi Baldwin and Benjamin E. Hopkins, had been theretofore, and for many years prior to the transactions in this petition alleged, engaged in excessive and reckless speculations in wheat and other commodities, and were well known to the president and directors of said association to be excessive and reckless speculators, and wholly unfit to have the charge, management, and control of the moneys, assets, and affairs of the said Fidelity National Banking Association; and complainant avers that by reason of said facts and the knowledge thereof, the said president and directors were put upon inquiry as to the management of the affairs of said banking association, and the safe keeping and investment of its moneys and other properties, during the whole time, during which the money of said association was being loaned and embezzled and misappropriated, as hereinbefore set forth; yet the said president and the said directors, and each of them, in gross and willful disregard of their duty as such directors, wholly failed to exercise the slightest

diligence, or make the slightest investigation of the conduct of the business of said bank; and that any investigation of the affairs of said bank, or examination of its books and of the evidences of indebtedness held by said bank, would have disclosed to the said president, or either of said directors, that the moneys of said bank were being loaned, and liabilities to said bank were being contracted, in violation of the law, and that the affairs of said bank were being mismanaged and its moneys and assets were being embezzled and misappropriated in the manner hereinbefore set forth; and that the exercise of proper care and diligence in the discharge of their duty as president and as such directors, would have prevented the losses described to said banking association.' "

Evidence of banking usage. Upon the second hearing in the Circuit Court, after the decision of this Court in the *Western National Bank* case and the remanding which followed that decision, it was shown by the testimony of bankers in Cincinnati and New York that, prior to that decision, it was usual, and an ordinary incident in the banking business, for one bank to borrow from another; that by custom and usage it was within the scope of the authority of each of the executive officers of a bank, president, vice-president, if actively engaged, and cashier, to make application for such a loan, and it was never considered necessary for them to submit proof of their authority so to do; and that the loan would be made either by re-discounting negotiable securities offered by the borrowing bank, or by a loan with such securities as collateral, or at times without security. We shall have occasion hereafter to quote some of this testimony, and in that connection will mention more particularly the qualifications of the different witnesses. It is enough here to refer to the summary of their testimony given by the Court below (Rec., pp. 334–337), and to say that they were executive officers of some of the most prominent banks in New York and Cincinnati, and that their testimony stands entirely

uncontradicted, the receiver not having called a single witness upon this subject, or to show that the directors of the Fidelity Bank were not fully aware of this usage.

ARGUMENT.

We have been thus particular and minute in detailing the facts of the case that the Court might be made fully aware at the outset how different the state of affairs presented by this record is from that which was presented in *Western National Bank* v. *Armstrong*, 152 U. S. 346; and that even should your honors be disposed to adhere to the definition of the banking business given in that opinion, yet you should see at the threshold of your consideration of the case at bar that, whatever might be thought as to to the authority of Harper and Baldwin to negotiate the loan here in question, the assets of the Fidelity Bank were plainly responsible for the money lent on the ground either of ratification of the loan made in fact or conclusively presumed by estoppel, or of that bank having used the money which the appellee lent.

But while thus maintaining that the decree below can and should be affirmed consistently with that opinion as it stands, yet because we believe that opinion to be a departure from principles of law theretofore considered well settled, and, if adhered to, likely to cause trouble and confusion in the banking business, we invite the Court to a reconsideration of it, and therefore shall first discuss the nature of the business of banking.

I. POWER OF BANKS TO BORROW.

As a rule wherever money is to be used in a business there the borrowing of money is incidental to that business. Because of this the doctrine is well settled that all commer-

cial corporations have an implied power to borrow money. Morawetz on Corporations, sec. 342; 4 Thompson on Corporations, sec. 5697. This doctrine has been affirmed by this Court in *Railroad Company* v. *Howard*, 7 Wallace, 392, 412, in the following words:

"Private corporations may borrow money, or become parties to negotiable paper in the transaction of their legitimate business, unless expressly prohibited; and until the contrary is shown, the legal presumption is that their acts in that behalf were done in the regular course of their authorized business."

The question here is whether this doctrine and this presumption apply to banks. Undoubtedly they are borrowers of money in the course of their business; indeed the primary object of their business is to borrow money. For their circulating notes merely represent loans to them of specific sums payable upon demand; and their deposit accounts are also but loans payable upon demand in sums desired by the depositor. *Phœnix Bank* v. *Risley*, 111 U. S. 125; *State* v. *Bartley*, 39 Neb. 353; 23 L. R. A. 67. These are the every day business of the bank; and without one or the other of them it would die of dry rot. So the question here involved is not whether borrowing money in this way is incidental to banking, but assuming that it is whether any other kind of borrowing is so incidental; in brief, whether it is a recognized part of the banking business to hire money; to obtain it on time, or with the understanding that it shall not be immediately withdrawn, and to pay for its use.

We submit that transactions of this nature have always been considered a legitimate and ordinary part of the banking business. In proof of this we shall call as witnesses legislation that has been passed creating banks,

well informed writers upon the banking business, judicial opinions by Courts of the highest standing, and the uncontradicted sworn testimony of bankers of the present day. We had made very full citations from works on banking, and reported decisions upon this subject in our brief filed in the Court below. Counsel for defendant in error in Case No. 206, on the docket of this Court for this term, *H. F. Auten as Receiver of the First National Bank of Little Rock, Arkansas*, v. *United States National Bank*, have honored us by quoting *verbatim* that portion of our brief; and as that case will, in the ordinary course of events, be heard before this so that the Court will be familiar with the matter there quoted, we shall not here repeat all of the citations we made below. We shall abridge those there used, preserving their most salient points; and to them we shall add others of which we made no use below.

LEGISLATION.

The earliest statute recognizing such borrowing as a part of the banking business was passed in 1670, 22 and 23 Charles II; we have not access to the original statute, but we find the following quotation from it in vol. I, p. 541, of *Lex Mercatoria* by Wyndham Beawes (Joseph Chitty's edition, published in 1813):

"Whereas, several persons being goldsmiths, and others, by taking up or borrowing great sums of money, and lending out the same again for extraordinary hire and profit, have gained and acquired to themselves the reputation and name of bankers, etc."

Next is the noted act of 1694 establishing the Bank of England, 5 & 6 W. & M., c. 20. This act nowhere in terms conferred the power to borrow money; but its existence was recognized by the limitation which was put upon

it in section 26, by which the bank was forbidden to borrow more than the amount of its capital, in the following terms:

"That the said corporation so to be made, shall not borrow or give security by bill, bond, covenant or agreement under their common seal for any more, further or other sum or sums of money, exceeding in the whole the sum of twelve hunded thousand pounds, so that they shall not owe at any one time more than the said sum, unless it be by act of parliament upon funds agreed in parliament; and in such case only such further sums as shall be so directed and allowed to be borrowed by parliament, and for such time only, until they shall be repaid such further sums as they shall borrow by such authority." And if this limitation be exceeded, that the stockholders shall be responsible for the excess *pro rata*.

It will be observed that the words of obligation here mentioned are not confined to those which would create indebtedness merely by a bank note or a bank deposit, but extend beyond and cover every kind of liability, and that they imply not merely demand loans, but loans on time. If one could be in doubt as to this on reading the section, such doubt would be removed by reading the first act in which parliament gave power to borrow a further sum, section 30 of the act of 1697, 8 & 9 William III., c. 20; for this, after reciting the section just mentioned, gave power to borrow an additional sum of money by bills or agreement under their common seal, with the proviso, however, that—

"The said governor and company do oblige themselves in their said bills, by them to be given out, to answer and pay the money therein mentioned upon demand."

Section 28 of the act just mentioned declared that no other bank, or institution in the nature of a bank, should be countenanced by parliament during the existence of the

Bank of England. Ten years later, in section 9 of the act of 6 Anne, c. 22, this provision was recited, and the section continues:

"*Nevertheless since the passing of the said act some corporations by colour of the charters to them granted, and other great numbers of persons, by pretence of deeds or covenants united together, have presumed to borrow great sums of money, and therewith, contrary to the intent of the said act, do deal as a bank, to the apparent danger of the established credit of the kingdom:* now for preventing of such practice in time to come, and the mischiefs thence to arise, be it enacted by the authority aforesaid, That from and after the twenty-ninth day of *September*, in the year of our Lord seventeen hundred and eight, during the continuance of the governor and company of the bank of *England*, it shall not be lawful for any body politick or corporate whatsoever, erected, or to be erected, other than the said governor and company of the bank of *England*, or for other persons, whatsoever united or to be united in covenants or partnership, exceeding the number of six persons, in that part of *Great Britain* called *England*, to borrow, owe, or take up any sum or sums of money on their bills or notes, payable at demand, or at any less time than six months from the borrowing thereof."

The enactment just mentioned, with modifications, has since been continued in force, and is generally said to be *the banking franchise* of the Bank of England. It will be noted that the prohibition is not merely as to demand notes and bills, but as to any notes and bills having less than six months to run, thus conclusively showing that the issue of time paper, and consequently the borrowing of money on time, was then, and has since been, considered a natural feature of the banking business.

Section 39 of an act passed in 1716, 3 George I, c. 8, enlarged the borrowing powers of the Bank of England,

and removed from such loans the restrictions of the usury laws, in the following terms:

Section 39. "And it is hereby enacted, that the said governor and company of the bank of *England*, or their successors, shall have power and authority, and they are hereby enabled, in case they shall think fit, from time to time, and at any time or times, at their own good liking, to borrow or take up money upon any contracts, bills, bonds or obligations, under their common seal, or upon credit of their capital stock or stocks, or any part thereof, or otherwise, for any time, or to be paid upon demand, and at such rates of interest, or upon such terms as they shall think fit, although the same shall happen to exceed the interest allowed by law to be taken, and to give such security for the same, as shall be to the satisfaction of the lenders respectively; any former law, statute, prohibition, restriction, clause, matter or thing whatsoever to the contrary notwithstanding."

Passing now to this country, we ask attention to the act approved February 25, 1791, incorporating the first Bank of the United States with a capital of $10,000,000, 1 U. S. Stat. at Large, 191. Paragraph 9 of section 7 was modeled upon section 26 of the Bank of England act of of 1694; but it contains a modification that is noteworthy. It reads:

"The total amount of the debts, which the said corporation shall at any time owe, whether by bond, bill, note, or other contract, shall not exceed the sum of ten millions of dollars over and above the moneys then actually deposited in the bank for safe-keeping, unless the contracting of any greater debt shall have been previously authorized by a law of the United States." Yet, if the limitation were exceeded, the corporation was liable, and its non-dissenting directors as well.

By thus restricting the right to borrow its existence is

necessarily recognized. The restriction is not upon the indebtedness created by deposit with the bank, for that is expressly excepted; nor is it limited to its circulating notes, for the words of obligation extended beyond those and include *bond*, bill, note, or *other contract*. Its paper of circulation was the notes mentioned in paragraph 13 of section 7 (to which we shall advert more particularly shortly, in connection with the act of 1816), as well as paragraph 9; the words *bond and other contract* in paragraph 9 refer to other kinds of indebtedness, that is to say, to the borrowing of money in other ways for the use of the bank.

The act approved April 10, 1816, creating the second Bank of the United States, with a capital of $35,000,000, 3 U. S. Stat. at Large, 266, was even more explicit. Paragraph 8 of section 11 was like paragraph 9 of section 7 of the act just mentioned, *mutatis mutandis*. Paragraph 12 of that section is substantially the same as paragraph 13 of section 7 of the earlier act, with the exception that it adds two provisos which serve to explain the nature of the earlier enactment, and to make it still more apparent that power was given to the bank to borrow money on time for use in its business. We print paragraph 12 as it is found in the act of 1816, italicising the words in the latter act which are not found in paragraph 13 of section 7 of the act of 1791, and adding in brackets words in that paragraph which are not found in paragraph 12 of section 11 of the act of 1816:

"*Twelfth*. The bills, obligatory and of credit, under the seal of the said corporation, which shall be made to any person or persons, shall be assignable by endorsement thereupon, under the hand or hands of such person or persons, and his, her, or their *executors or administrators, and his, her or their* assignee or assignees, and so as absolutely to transfer and vest the property thereof in each and every

assignee or assignees successively, and to enable such assignee or assignees, *and his, her or their executors or administrators*, to [bring and] maintain an action thereupon in his, her, or their own name or names; *Provided, That said corporation shall not make any bill obligatory, or of credit, or other obligation under its seal for the payment of a sum less than five thousand dollars.* And the bills or notes which may be issued by order of the said corporation, signed by the president, and countersigned by the principal cashier or treasurer thereof, promising the payment of money to any person or persons, his, her or their order, or to bearer, although not under the seal of the said corporation, shall be binding and obligatory upon the same, in [the] like manner, and with [the] like force and effect, as upon any private person or persons, if issued by him, *her* or them, in his, her or their private or natural capacity or capacities, and shall be assignable and negotiable in like manner as if they were so issued by such private person or persons; that is to say, those which shall be payable to any person or persons, his, her or their order, shall be assignable by endorsement, in like manner, and with the like effect as foreign bills of exchange now are: and those which are payable to bearer shall be assignable and negotiable by delivery only: *Provided, That all bills or notes, so to be issued by said corporation, shall be made payable on demand, other than bills or notes for the payment of a sum not less than one hundred dollars each, and payable to the order of some person or persons, which bills or notes it shall be lawful for said corporation to make payable at any time not exceeding sixty days from the date thereof,*"

The seventeenth paragraph of section 11 of the act of 1816 contained another provision the like of which is not found in the act of 1791, viz.: "*Seventeenth.* No note shall be issued of less amount than five dollars." The changes in current legal phraseology since those acts were written call for a few observations. The first part of paragraph 13 of section 7 of the act of 1791, and its equivalent in paragraph 12 of section 11 of the act of 1816, relating to bills

obligatory and of credit under the seal of the corporation, was borrowed almost *verbatim* from section 29 of the act creating the Bank of England, 5 and 6 W. & M., c. 20. In the course of time the words *bill obligatory* have almost vanished from common use. Such an instrument was what we now call a single bond, that is, an instrument under seal reciting an obligation to pay money without condition or penalty. Thus Lord Coke says, Co. Litt. 172:

"Obligation is a word of his own nature of a large extent; but it is commonly taken, in the common law, for a bond containing a penalty, with condition for payment of money, or to do or suffer some act or thing, etc., and a bill is most commonly taken for a single bond without condition."

In Jacob's Law Dictionary, in defining the word *obligation*, the passage just quoted is referred to, being preceded by the following:

"A bond, containing a penalty, with a condition annexed for payment of money, performance of covenants, or the like; it differs from a bill, which is generally without a penalty or condition, though a bill may be obligatory."

And in Anderson's Law Dictionary, under the word *bill*, it is said:

"Bill: bill obligatory, bill penal, bill single, a bond without a condition. An instrument acknowledging indebtedness in a certain sum to be paid on a day certain. Differs from a promissory note in having a seal affixed. 'Bill obligatory' has a seal."

So in *Farmers, etc., Bank* v. *Greiner*, 2 S. & R. 114, Chief Justice Tilghman said in the year 1815:

"Bills of exchange and bills obligatory are very different things. . . . A bill obligatory is an instrument in

common use and too well known to be misunderstood. It is a bond without a condition, sometimes called a single bill, and differing from a promissory note in nothing but the seal which is annexed to it."

With this definition in mind, the object of the provision last quoted from the acts creating the two banks of the United States becomes clear. The first half, relating to bills obligatory and of credit, refers to obligations under seal, given for money borrowed, and restricted by the second act to large sums. The second half relates to commercial paper—not merely to ordinary bank notes, but to all negotiable instruments, because it refers to instruments payable to order as well as to those payable to bearer—and to those payable on time as well as to those payable on demand. As the act was intended to operate throughout the United States, and as the statute of Anne, which put promissory notes upon the footing of bills of exchange, was not operative in all of the states, it was necessary to enact that notes as well as bills should be negotiable. But post-notes and post-bills, in other words, time obligations, were required to be payable to order and not bearer, and to be for a sum of at least one hundred dollars. Thus power was given to these banks, not merely to borrow money by issuing circulating notes, but to borrow upon all the recognized instruments of commerce, and in any amount and on any time, the only restriction being that if the loan were on time the instrument must run to a named person or his order, and not merely to bearer, and must be for a loan of at least one hundred dollars: and if the time were longer than sixty days, the instrument was assignable merely and not negotiable, and must assume the more solemn form of a sealed obligation, and be for not less than five thousand dollars.

The failure of the United States Bank of Pennsylvania, which grew out of the ashes of the second Bank of the United States, and the panic of 1837, led the legislatures of several of the states to adopt general laws for the formation of banks. The model of these was the Free Banking Law of New York, passed in 1838. This contained no express legislation as to borrowing; but, as we shall point out when we come to mention the judicial opinions, that power was held to be conferred thereby.

Chapter 36, of the Revised Statutes of Massachusetts, passed November 4, 1835, contains the general banking law of that state. Sections 9 and 10 of that act read as follows:

"IX. The total amount of debts, which any bank shall at any time owe, shall not exceed twice the amount of its capital stock, actually paid in, exclusive of sums due on account of deposits not bearing interest; nor shall there be due to such bank, at any time, more than double the amount of its capital stock actually paid in.

X. Debts due to any bank from any other bank, including bills of the bank so indebted, shall not be deemed debts due to a bank, within the intent and meaning of the preceding section."

These provisions, it will be noted, are modeled upon the acts of Congress just mentioned, but enlarge the power by excluding from the limitation not only deposits not bearing interest, but moneys owing to another bank. Sections 11–13 make the bank and non-dissenting directors liable for loans in excess of the limitation. This act thus not only recognizes the power of a bank to pay interest upon deposits, but to borrow from other banks in other ways than by receiving money on deposit from them.

Section 56, of the Ohio "act to incorporate the State Bank of Ohio and other banking companies", passed

February 24, 1845, 1 Swan & Critch. Rev. Stat. 137, reads as follows:

"Sec. LVI. No banking company deriving any of its powers or privileges from this act, shall at any time be indebted, or in any way liable, to an amount exceeding, if a branch of the State Bank of Ohio, two-thirds, or, if an independent banking company, the whole amount of its capital stock at such time actually paid in, and remaining as capital stock, undiminished by losses or otherwise, except on the following accounts, that is to say: .

First. On account of its notes of circulation;

Second. On account of moneys deposited with, or collected by, such company.

Third. On account of bills of exchange or drafts drawn against money actually in deposit to the credit of, or due to, such company;

Fourth. Liabilities to its stockholders on account of money paid in, on capital stock and dividends thereon."

The same limitation was incorporated in section 20 of the Ohio "act to authorize free banking", passed March 21, 1851, ibid. 171.

The sections just mentioned are notable as they were familiar to Mr. Chase, who was secretary of the treasury when the National Banking Acts were passed, and largely instrumental in securing their passage, and as their substance was introduced into those acts, as will be noted *infra*. Further comment upon them is postponed until that time.

WORKS ON BANKING.

We have already referred to "Lex Mercatoria" by Wyndham Beawes. This was a standard work of the last century. Its value survived to this century, for the sixth edition was published in 1813, and edited by Joseph Chitty. In the chapter treating of banks he classifies them according as they are managed by the public authorities, or by

an association in the nature of a joint stock company, or as a purely private enterprise. As to the joint stock banks, he says, page 513 (*italics* ours):

"A second sort of banks is such as consist of a company of moneyed men, who being duly established and incorporated by the laws of their country, agree to deposit a considerable fund or joint stock, to be employed for the profit and advantage of the whole society, in all those ways which are compatible with the nature of such an undertaking; *as borrowing upon their own credit;* and lending money upon good securities; buying and selling bullion, gold and silver, and foreign specie; discounting of bills of exchange, or other secure debts; receiving and paying the cash of other persons; and of this kind is the Bank of England."

The most valuable and thorough work of this century upon banking as a commercial business is that of J. W. Gilbart, F. R. S., originally published in 1829 under the name of "A Practical Treatise on Banking," but in more recent editions called "The History, Principles and Practice of Banking." Mr. Gilbart was probably the most successful and accomplished banker in England of his day. He was the originator, and for many years the manager, of the London and Westminster Bank, the first of the joint stock banks formed in London. In the fifteen years from its organization in 1834 until 1849, under his management, that bank had accumulated a surplus of over half a million dollars, after paying regular dividends at the rate of four, five, and six per cent. Under the leadership of Mr. Gilbart this bank undertook to accept bills of exchange, which led to a contest with the Bank of England as being an infringement upon its vested rights, in which position the latter was ultimately sustained by the House of Lords; see *Bank of England* v. *Anderson*, 2 Keen, 328; 3 Bing. N. C.

589; and *Booth* v. *Bank of England*, 2 Keen, 466; 7 Clark & Fin. 509; but this right was subsequently given to the joint stock banks by statute. (See Lawson's History of Banking, 1st American edition, edited by J. Smith Homans, and published by Gould & Lincoln in 1852, pages 183–185). We mention these matters simply to show the very great practical familiarity of Mr. Gilbart with the subject on which he writes. His book has gone through many editions, some of which are quite recent—of itself testimony of the greatest weight as to its value; and it has always been cited with respect and as authoritative by others who have followed him in this field of investigation or in parts of it. From the edition of 1882, revised by A. S. Michie, deputy manager of the Royal Bank of Scotland, we quote as follows:

Vol. I, page 13: "The exchanging of money; the lending of money; the borrowing of money; the transmitting of money, are the four principal branches of the business of modern banking, and in most countries they seem to have taken their rise in the order in which they are here named."

Vol. I, page 23: "That part of the business of banking which consists in the borrowing of money, with a view of lending it again at a higher rate of interest, does not appear to have been carried on by bankers until the year 1645, when a new era occurred in the history of banking. The goldsmiths, who were previously only money-changers, now became also money-lenders. They became also money-borrowers, and allowed interest on the sums they borrowed."

Vol. I, pages 127, 128: "Banking is a kind of trade carried on for the purpose of getting money. The trade of a banker differs from other trades, inasmuch as it is carried on chiefly with the money of other people.

"The trading capital of a bank may be divided into two parts: the invested capital and the banking capital.

The invested capital is the money paid down by the partners for the purpose of carrying on the business. This may be called the real capital. The banking capital is that portion of capital which is created by the bank itself in the course of its business, and may be called the borrowed capital." . . .

"The profits of a banker are generally in proportion to the amount of his banking or borrowed capital. If a banker employ only his real or invested capital, it is impossible he should ever, in the ordinary course of business, make any profits. Bankers can seldom attain more upon their advances than the market-rate of interest; and that may be obtained upon real capital, without the expense of maintaining a banking establishment. If, after deducting the expenses, the profits amount to nothing more than the market-rate of interest upon the invested capital, the bank may be considered to have made no profits at all. The partners have received no higher dividend upon the capital invested in the bank than they would have received if the same money had been laid out in government securities. To ascertain the real profit of a bank, the interest upon the invested capital should be deducted from the gross profit, and what remains is the banking profit."

Vol. I, page 248: "The rediscounting of bills of exchange is an operation of much importance, and has a great influence on the monetary operations of the country. We quote from a former work of our own, *i. e.*, 'The History of Banking in America,' upon this subject: 'Banks situated in agricultural districts have usually more money than they can employ. Independently of the paid-up capital of the bank, the sums raised by circulation and deposits are usually more than the amount of their loans and discounts. Banks, on the other hand, that are situated in manufacturing districts, can usually employ more money than they can raise. Hence, the bank that has a superabundance of money, sends it to London, to be employed by the bill brokers, usually receiving, in return, bills of exchange. The bank that wants money sends its bills of exchange to London, to

be rediscounted. These banks thus supply each other's wants, through the medium of the London bill brokers.'"

(It will be remembered that the bill broker in London is an intermediary between the borrower and the lender. In the cases referred to by the author, he is the chain of connection between the borrowing and the lending banks.)

More than fifty years before Mr. Gilbart first published his book Adam Smith had stated that it was a common thing for the Scotch banks to borrow from their London correspondents when their supply of money was insufficient to meet the demand. We quote from "Wealth of Nations," Book II., c. 2. After stating that the Scotch banks, from an excess of circulation, were obliged to keep an agent at London to collect money for them and send it by carrier, he continues:

"Those agents were not always able to replenish the coffers of their employers so fast as they were emptied. In this case the resource of the banks was, to draw upon their correspondents in London, bills of exchange to the extent of the sum which they wanted. When those correspondents afterwards drew upon them for the payment of this sum, together with the interest and a commission, some of those banks, from the distress into which their excessive circulation had thrown them, had sometimes no other means of satisfying this draught but by drawing a second set of bills either upon the same, or upon some other correspondents in London; and the same sum, or rather bills for the same sum, would in this manner make sometimes more than two or three journeys; the debtor bank, paying always the interest and commission upon the whole accumulated sum."

The "History of Banking," by William John Lawson, was published in London in 1850. It is not an essay upon and inquiry into the business of banking like Gilbart's;

but it fully merits the claim made for it by the author in the preface of "being an extensive collection of facts connected with the banking system," and intersperses those facts with anecdotes of a very entertaining nature. The edition from which we quote is the first American edition, referred to p. 39, *supra*.

In c. 7, "On London Banking," at p. 106 of that edition, the author, having alluded to the superseding of the Jews, the earliest English bankers, by the Lombards, and of the latter in the early part of the seventeenth century by the goldsmiths, and to a change in method by the latter, continues (*italics* ours) :

"The change consisted in the lending of money by the latter on personal credit, and at a moderate rate of interest compared with that charged by their predecessors. They also issued promissory notes, payable on demand *and at fixed periods, bearing interest.* Such notes were called 'goldsmiths' notes.'"

This practice was evidently continued by the Bank of England in its early history, as will appear from *ibid.*, pp. 43 and 44 in c. 4, on the "Foundation of the Bank of England." The statement of the condition of the bank on November 10, 1696, given to the House of Commons and there quoted, and the comments of the author, make this manifest, and show furthermore that the bank was then indebted in 300,000 pounds for moneys borrowed in Holland.

In c. 8, "On Country Banking," at p. 156, the author says :

"Most bankers in the country carry on their business of borrowing or receiving money at interest, as well as lending upon securities, and they thereby form a connecting link in the chain between the operative and inoperative classes ; they become the debtors of the capitalists and the creditors of the producers or distributors of revenue, and

thus afford a ready medium of adjustment between the interests of these two great divisions of society."

In c. 11, "On Scotch Banking," at p. 236, the author says:

"All the Scotch banks have an original subscribed capital of their own; they receive deposits from the public, for which they allow interest, and they issue notes of all denominations from one pound and upwards."

In 1847, there was published in London a book called "Capital, Currency and Banking," by James Wilson, Esq., M. P., being a republication of a series of articles printed in the "Economist" in 1845 and 1847. We quote from article 3, page 26:

"As a general rule, the independent capital of bankers constitutes but a very small portion of the means upon which they trade. As we have before observed, bankers are rather the medium through whom the capital of others is lent and borrowed than dealers in their own capital. The private and independent paid-up capital belonging to banks may be looked upon rather in the light of a guarantee to the public for their security against the risk which it is known bankers must incur in the use of the deposits placed in their hands, than as constituting any very important portion of their means of trading.

"A banker being essentially, in the first place, a borrower of money, returnable on demand, the great art of his profession is to employ those funds in such a way as will at all times and under ordinary circumstances, enable him to meet such demands."

Page 32: "The practice of banks [in London] not allowing interest on deposits has at length changed the character of the bill-broker to that of a banker, taking deposits (money at call), at a given rate of interest, from one man to lend it by discounting bills at a higher rate of interest to others. At the same time that he acts as a medium

for transferring spare capital which accumulates with banks in one part of the country to those in other parts, where trade and commerce create a greater demand for it."

Also from article 4, page 36. "The business of a banker is to borrow and lend."

G. M. Bell, Secretary of the London Chartered Bank of Australia, has published a little book called "The Philosophy of Joint Stock Banking." We quote from the second edition, published in 1855, from Chapter 10, entitled, "On Rediscounting." After stating that rediscounting is common, and arguing against it as a habit, the author continues, page 69 (*italics* ours) :

"It is well known that banks in the agricultural districts accumulate capital by deposits and circulation, for which they can find no other employment than by sending it to the London bill-brokers, or investing it in the funds. It is equally well known that banks in the mining and manufacturing districts have demands upon them for accommodation out of proportion to their capital, which they can not otherwise supply than by having recourse to the system of rediscounting with bill-brokers. This latter class derive their profits from the difference of interest on the money borrowed and lent between the banks in this way. The borrowing bank, therefore, pays an extra charge, which by a different arrangement might be avoided, and both parties be equally well accommodated. The arrangement here suggested is that *one bank should lend direct to another* without the intervention of a broker. The bank that borrows money from its depositors at two per cent could very profitably lend to its neighbor at two and a half or three per cent, more or less, in proportion to the ever-changing value of money."

In 1885 there was published by John Murray, of London, the second edition of a book called "The Country Banker, His Clients, Cares and Work, from an Experience

of Forty Years," by George Rea, author of "Bullion's Letters to a Bank Manager." We quote from page 218:

"*Rediscounting*.—The rediscount, or sale of a portion of its bills, is often an important feature in the financing of an English country bank."

The author then proceeds to state some of the objections to this practice, and continues:

"But the objections which apply to banks having ample resources within themselves do not apply to banks placed in districts of great industrial activity, where deposit money is scarce and the demand for loan capital is great. There is nothing opposed to sound banking principle in banks thus placed supplementing their resources by rediscounting portions of their bills, and thus drawing supplies from the London market. A bank, by this process, merely transfers that portion of its discount business to London which is in excess of its local means to meet it."

Mr. Walter Bagehot, in "Lombard Street" (edition of 1873, published by Scribner, Armstrong & Co., N. Y.), says:

Page 243. "A banker's business—his proper business—does not begin while he is using his own money; it commences when he begins to use the capital of others."

On page 285 he quotes from the testimony given by Mr. Richardson in 1810 to the Bullion Committee of Parliament, as to the nature of an agency for country banks: "'It is two-fold; in the first place, to procure money for country bankers on bills when they have occasion to borrow on discount, which is not often the case; and in the next place, to lend the money for the country bankers on bills on discount. The sums of money which I lend for country bankers on discount are fifty times more than the sums borrowed for country bankers.'"

On page 287 Mr. Bagehot says: "For the most part agricultural counties do not employ as much money as they

save; manufacturing counties, on the other hand, employ much more than they save; and therefore the money of Norfork or of Somersetshire is deposited with the London bill-brokers, who use it to discount the bills of Lancashire and Yorkshire."

From the quotations we have made thus far from English works it would be inferred that while it was common for the English country banks and the Scotch banks to pay interest upon deposits, and thus hire money in the strictest sense, yet this was unusual among London banks. The latter ceased to be true about fifty years ago, and since then it seems to have been a common thing for even the best managed of the joint stock banks and private banks of London to pay interest upon deposits. To show the present nature of the business of banking as understood in England we quote from the article on "Banking" in the last edition of the Encyclopedia Britannica as follows:

"It will be convenient here to give a general sketch of the nature of the business of an ordinary banker. We have said he receives and lends money; he may receive money either on a deposit or on a current or drawing account. When money is received on deposit it is commonly repayable to the depositor alone, to whom a deposit note or receipt is given; but it may also be paid to any one to whom the depositor gives an order on the bank either endorsed on the deposit note or receipt or accompanying it. If the banker undertakes to pay interest on deposits, the rate varies according to the length of the notice the depositor agrees to give before withdrawing the money, the ability of the banker to deal with it being, of course, dependent upon the time he may rely upon keeping it. When money is received on a current or drawing account, the customer of the banker draws it out, as he requires, by means of orders, to which the specific name cheques is given.

"We have elsewhere hinted at the subdivision of the

business of banking which has accompanied the development of commerce. A banker borrows and lends money, but the conditions under which money is borrowed or lent may be extremely various, and the different classes of bankers are distinguished from one another by difference in the rules which they observe in borrowing or lending. Bankers may borrow on call, at deposit, on debentures, at interest, or without interest, and they may lend on open credits, by discounting bills, by advances on mortgages repayable in installments or otherwise, etc., etc."

The article then specifies as the various kinds of banks: Banks of deposit which borrow upon time certificates bearing interest, of which Land Mortgage Banks, lending on real estate mortgages, and Credit Companies, lending on industrial enterprises, are species; Discount Banks, as to which it says:

"Discount banks and discount agencies borrow money on call or deposit, and lend it exclusively in the discount of bills and negotiable securities, which they often rediscount with capitalists desirous of investing their money in forms capable of being speedily realized."

Trust Companies which borrow on debentures and invest in foreign loans and similar securities; and Savings Banks which gather in the smaller savings of the poor.

After alluding to the fact that the Bank of England does not allow interest upon deposits, and quoting from the evidence of Mr. Weguelin, a former Governor of that bank, before a committee of parliament in 1857 defending this practice, the article comments upon his testimony as follows:

"He says nothing to explain why they," the directors of the bank, "should not, as the managers of a joint stock company, use every means of profitably extending their business, and it is incontestable that if the bank directors

offered to receive deposits at interest, the reputation of the bank would enable them to defy the competition of the other joint stock banks. The truth is, that the non-allowance of interest is a tradition, of no authority in itself, and operating injuriously in keeping up the delusion that the banking department of the Bank of England is an institution differing essentially in the character of its business from other banks."

Turning now to a work written in this country, we call attention to "The Methods and Machinery of Practical Banking," by Claudius B. Patten, of Boston, Mass., published in 1891. From the preface, it appears that Mr. Patten had been for twenty years, prior to 1867, connected with the Suffolk Bank of Boston; that in that year he became cashier of the State National Bank of that city, where he continued until his death in 1886; and that the book is a compilation by his successor of sundry articles published during his life in the Journal of Banking.

On page 355 he gives this statement as to the clearing house loans which were such a feature in the case of the *Merchants' Bank* v. *State Bank*, 10 Wallace, 604:

"LOANS BETWEEN BANKS AT CLEARING.

"In some of our clearing house cities, notably in Boston, the banks are in the habit of borrowing of each other, as their situation may demand, immediately after they have made their morning settlements. These negotiations are, of necessity, made by the representatives of the banks who are present at the clearing. And these representatives are mainly the messengers and settling clerks of the banks, though it has of late years become the custom with many banks to be present at these morning after-clearing negotiations in the person of their cashier.

"This custom has been in existence for at least twenty years, and the aggregate of loans of this class made there daily is very large, ranging from hundreds of thousands to

millions of dollars. I have known many instances where banks, which have emerged from the morning settlements with gains of more than a million, have, before leaving the clearing house, scattered these entire gains in loans among losing banks—loans negotiated on both sides by single representatives of the banks, and those often junior clerks. There is nothing of this sort done in the European clearing houses.

"I found the London bankers interested and astonished to hear that we indulged in financial transactions of this character.

"The loans made at clearing are loans of minute money. They are rarely secured by deposit of collateral of any sort.

"The bank receiving the accommodation draws upon the lending bank a check in its usual form. The loan is charged to it; and, when it is repaid, the lending bank settles the transaction by simply drawing upon the debtor bank for the amount.

"The current rates for these loans are usually about one per cent under those charged upon standard call loans to private bankers and merchants. This is because they are loans for large round sums, ranging say from ten thousand to hundreds of thousands of dollars, and because the money thus advanced is understood to be immediately available in the form of clearing house funds."

On page 406, he says:

"Shall national banks become dealers in money, or shall they simply bank upon the capital furnished them by their shareholders, unhired depositors, and bill holders? There is no banking question of the period of more vital interest than this, and none which is being more actively discussed.

"There is no doubt but that some of the most successful banks in the United States—banks which have paid the largest kind of dividends, and which to-day show a heavy surplus and a current business of the most profitable charac-

ter—are those which have been run upon a moderate share capital and large interest-paid deposits. These banks have bought money in all directions, paying comparatively heavy prices for it, and have sold the same at a very slight advance. Yet the magnitude of their transactions has so swollen their profits that their small capitals have reaped the largest remuneration. This is doing business on the London joint-stock bank principle—a principle which has in London been worked with marvellous success. The leading London banks in question carry deposits, upon which heavy interest is paid, to the amount of from ten to twenty times their capital. Their dividends have for many years been enormous, and their shares to-day sell, in some instances, at two or three times their par value.

"Banks which deal in money to the extent which I have described and which carry the limited share capital, have need only of making a very small percentage on the money they handle in order to earn a large dividend for their share capital. The motto of such institutions is large sales and small profits, yet the net results are most satisfactory."

JUDICIAL OPINIONS.

Many of the cases in which the power of banks to borrow money has been discussed involved also the authority of the agent through whom the loan was effected. Such cases will be noticed *infra* under other heads of this argument; and to them we refer without repeating here. The cases to which we now invite the attention of the Court are principally those in which it was contended that borrowing was not a legitimate part of the banking business, and therefore, that a bank had no power to borrow money where that power was not expressly given by its charter. This question was presented to the Privy Council in England and to the courts of last resort in New York and Illinois in three cases of great importance. In each of these cases the nature of the banking business and of the

transactions incident to it were carefully examined; and for this reason they deserve to be stated with some particularity of detail.

The first of these in time is the case of the *Bank of Australasia* v. *Breillat*, 6 Moore P. C. C. 152, decided by the Privy Council in December, 1847. The facts, so far as necessary to state them for our present purpose, were as follows: The Bank of Australasia was a partnership doing business at Sydney, in New South Wales. The Bank of Australia was a joint stock company, incorporated under a special act, doing business at the same place; the defendant, Breillat, was the chairman of the Bank of Australia, and the nominal defendant, under statutory provisions, in suits brought against it. The deed of settlement, which constituted the charter of the Bank of Australia, put the control of its business in a board of directors, and declared that business to be the discount and issue of notes and bills, the lending of moneys on securities, and cash accounts for the safe custody of moneys and securities for moneys, for general public accommodation and benefit, and transacting and negotiating all other matters usually connected with the ordinary business of banking; and by clause 54 it declared the board of directors should have entire control of the lending of money on bills, notes, etc., the purchase and sale of bullion, gold and silver, and such coins and moneys as they might think necessary or advisable, and of calling in all moneys due the company. The Bank of Australia, early in 1843, having become involved in difficulties, applied to the plaintiff for assistance. This was given in the form of a loan of £154,000 sterling upon certain conditions involving, among other things, the winding up of the banking business of the Bank of Australia. In October, 1843, the Bank of Australia gave its demand note for the sum thus lent. In

August, 1844, the share holders in the Bank of Australia declared this note was not binding on that bank, and instructed the directors to defend any action brought to recover on the same. Thereafter this suit was brought upon the note. The committee of the Privy Council who sat in judgment were Lord Brougham, Lord Langdale, Lord Campbell, Dr. Lushington, and T. Pemberton Leigh. The opinion of the committee was delivered by the latter. Having stated the facts and the issue, and described the nature of the powers given to the board of directors, he continues, page 193:

"The effect, we think, is to confer on these directors all the powers of managing partners in ordinary partnerships of a similar character, unless there is something in the subsequent clauses of the deed restricting those powers.

"First, then, is the power of borrowing money for the purposes of the partnership, one of the powers which belong to a partner in ordinary banks? And, secondly, if so, is there any restriction expressed, or to be inferred, from the deed?"

Then, having quoted with approval sections 124 and 125 of Story on Agency as to the powers of partners, and having shown that borrowing money for partnership purposes is unquestionably one of those powers, he continues, page 194:

"Then, is the nature of a banker's business such as to exclude the power, from want of occasion of its exercise? Quite the contrary. The nature of a banker's business, especially if the bank be one of both issue and deposit, necessarily exposes him to sudden and immediate demands, which may be to the extent of a large proportion of his debts, while his profits are to be made in employing his own moneys and those entrusted to him in discounting bills, in loans, and other modes of investment. It is im-

possible that he should always have his assets in such a state as to be applicable immediately to the payment of all demands which may be made upon him; and if a partner has no power, under such circumstances, to borrow money for the partnership, either the assent of each individual member must be obtained, which may even be impracticable, or the concern must be ruined.

"We have no doubt at all, therefore, that, in ordinary banking partnerships, such power exists, and that the directors, by the terms of their appointment, had all the general powers, and among the rest, the power of borrowing, unless such power is excluded by other provisions of the deed."

The next case is that of *Curtis* v. *Leavitt*, 15 N. Y. 9, decided in 1857. The case grew out of the failure of the North American Trust and Banking Company, incorporated under the general banking law of New York, passed in April, 1838. This bank, having a paid-up capital of over $3,000,000, became embarrassed in 1840, and to provide means to meet its obligations issued its bonds in two series, one for one million dollars, and the other for half a million dollars; each series of bonds was secured by a separate deed of trust conveying specific assets of the company for that purpose. In 1841 the company went into the hands of a receiver, who instituted this suit to declare these bonds and the trust deeds securing them void as being beyond the corporate power of the company, and also as creating a fraudulent preference. The case was argued by some of the ablest counsel who ever practiced in New York, and from the opinions it is evident that it must have been most thoroughly argued and carefully considered. There were five of these opinions, delivered by Judges Comstock, Brown, Shankland, Paige, and Selden. Judges Johnson and Bowen concurred in the opinion of Judge Comstock. Chief Judge Denio did not sit in the case, having been of

counsel. Each of the opinions discusses the nature of the banking business and the powers given by the New York Banking Act of 1838. As those powers were given in language almost identical with that contained in the National Banking Act (the sections are quoted, p. *infra*), the decision is of peculiar importance, for it gave a judicial construction to the statute upon which the National Banking Act was modeled. We shall quote from the language of each of the opinions. (*Italics* ours unless noted otherwise.)

Comstock, J. (p. 51): "I come next to the objection that banking associations formed under the general law of 1838, have no power to borrow money, and hence that this corporation could not issue its bonds, create the trusts, or give any valid assurance for a loan. This is a very grave proposition, *opposed to the known practice of probably every banking institution in the state.* It should, therefore, be well considered before it is received as the law."

Page 52: "Banking is not in its nature a corporate franchise. In the absence of legislative restraints, it may be carried on by individuals and partnerships in all its departments of issuing, lending, receiving deposits, discounting, dealing in exchange, bullion, etc.; and in examining the powers of banking corporations, the nature and incidents of banking as a business, when not under special legal restraints, are in the highest degree important. It is true the question will always be one of corporate power rather than of the rules and principles of banking; but those rules and principles may have a decisive influence in the construction of charters which profess to confer powers of this description. And this leads me to observe that banking, regarded as a business and not as a franchise, *includes the borrowing of money as one of its features or incidents. As no one denies this proposition*, I will not dwell upon it further than to quote the remarks of an eminent English judge, Mr. Pemberton Leigh, Chancellor

of the Duchy of Cornwall, in a late case of the Privy Council (*The Bank of Australasia* v. *Breillat*, 6 Moore P. C. 152, 194)."

He then quotes part of the same passage which we have just quoted from that opinion, and continues (*italics* his):

"It may be quite material, when we come to examine the general banking act of 1838, to observe now, in passing, that in these observations, so just and forcible, the borrowing of money is spoken of, not as a *distinct department* or *branch* in the business of banking, but is asserted as the *incident and result* of two of its most important operations, *those of issuing and receiving deposits.*"

He then proceeds to show that a banking partnership would undoubtedly have power to borrow money, and that a banking corporation must necessarily have the same power, unless expressly denied,—not as a grant of power, but as an incident to the other powers granted,—and shows that there are no restraints upon the power so long as it is exercised in the course of the banking business. His discussion of this branch of the subject runs from pages 51 to 66.

The parallelism between the language of the New York Act and that of the National Banking Act leads us to quote his remarks on the construction of that act from pages 56–58 (*italics* his):

"We come then to the question of construction, which to my own mind presents no difficulty. The argument on the other side urges that 'the business of banking' is authorized by the 18th section, only according to the specifications therein contained, among which the power to borrow is not found. To this the answer is, that these specifications, with the *issuing* power granted in the previous sections, cover the whole ground of banking. If the statute had omitted the general terms 'business of banking', and

had merely enumerated the power of issuing, and all the others named in the 18th section, that would have been a general grant of banking powers, including, as their incident, the right to borrow money when a necessity may arise in the exercise of those powers.

"To deny this conclusion is necessarily to assume (and it seems to be assumed, perhaps unconsciously) that borrowing is an independent operation in the business of banking; in other words, that it is banking in one of its branches, and hence that the power can not exist without a particular specification. This is, I think, plainly an error; and yet it appears to lie at the foundation of the opposing view of the present question. Now, in a very simple and elementary view of the subject, borrowing is not banking, nor is it in a just and proper sense any other kind of business. It is the incident and auxiliary of various kinds. Let us test this. If a person should open and keep an office for receiving deposits payable on demand, he would carry on a well known branch of banking business, although he might use the deposits in speculation or other modes totally unconnected with banking. He would be a banker. So if he were to keep an office for issuing his own circulating notes, or for dealing in exchange, or for discounting bills, and should actually carry on either of those operations without the others, he would exercise a banking power, although confined to a single one. But suppose he keeps an office and habitually borrows money on time, which he uses in manufacturing or some other branch of industry; was it ever supposed that such a practice made a man a banker? In truth he performs neither a banking nor a manufacturing operation, but one which is simply auxiliary to the business in which he is engaged. A banking corporation, therefore, when it borrows money, exercises an incidental and auxiliary power, not expressed, but implied from those which are expressed. On this ground the English Privy Council proceeded in the case of the *Bank of Australasia* v. *Breillat* (*supra*), as will be seen in the extract quoted above from the opinion in that case.

The right to borrow was not among the specifications in the deed, but was referred to the powers of issuing and of receiving deposits, which were specified. If these views are correct, they would seem to be decisive, for in the act of 1838 all known express banking powers are enumerated.

"The course of bank legislation in this state leads to the same conclusion. In the charters prior to 1825 there was no enumeration of the banking powers, but in that year the Commercial Bank of Albany was chartered, 'with all incidental and necessary powers to carry on the business of banking, by discounting bills, etc.,' proceeding with the same specifications as in the act of 1838, now under consideration. This was the model of a vast number of charters down to and including the year 1836, when special legislation of this kind ceased. Now, it is a fact not at all remarkable, but very pertinent to the present question, that in no special bank charter ever granted in this state was it thought of to specify the borrowing of money as one of the substantive and express banking powers. Yet I am not aware that it was ever before suggested that the right to borrow was excluded by the enumeration of those powers. Those specifications were evidently intended not to restrict the appropriate business of banking, but as a mere legislative definition of that business; a definition not indispensable, perhaps, but eminently useful, because it left nothing to construction or in doubt. Even the restraining laws may be referred to in corroboration of these views. Corporations, not expressly incorporated for banking purposes, were prohibited from exercising banking powers under a specification precisely like that found in all the special bank charters and in the general charter of 1838. (1 R. S. 712, secs. 3, 6.) Indeed, it would be difficult to conceive a greater absurdity than a prohibition against borrowing money in a statute intended merely to restrain unauthorized banking.

"Again, suppose a corporation were chartered under a special or general law for manufacturing purposes, with a particular authority to borrow money whenever deemed

necessary in the business: would that be considered a grant of one of the banking powers? Plainly not; and quite as plainly it would be, if the authority were to receive deposits or discount bills, or issue circulating notes."

The opinion of Brown, J., commences on page 133; that part of it which relates to the borrowing power begins on page 156. Having stated that the power, if given, is implied and not expressed, he says (p. 158):

"Whatever incidental power is a necessary and appropriate method to enable a banking institution to carry on the business of banking in the manner, to the extent, and with the means contemplated by the act of 1838, is as clearly within the terms of the grant as if it had been specifically mentioned. Before we can say, with any assurance, whether the power to borrow money is to be implied, we must look at the acts under which the associations are created, and see the nature of the business in which they are to embark, the usual and customary modes in which it is conducted, the instruments and resources with which they are to be furnished, and the emergencies and hazards to which the business is necessarily exposed. Banking is a system of credits. Its circulation is upon credit, it receives deposits upon credit, and if it deals in exchange, either domestic or foreign, that, too, is upon credit, more or less. It discounts bills and notes upon the faith and credit that its circulation will not be suddenly returned for redemption, or its deposits suddenly withdrawn. It is thus that it multiplies its capital and realizes its profits. Take away its power to use its credit, and confine it to the use of its capital alone, and its business would perish."

Page 160: "The right to raise money by loan for a legitimate end must exist as one of the incidental powers of the corporation, because its exercise may be indispensable to the preservation of its credit and the successful prosecution of its business. . . . So long as power is given to employ credit, as the basis of discount and circulation, the

power to borrow must be implied, or the business can not be usefully or successfully conducted. To refuse to recognize it as one of the powers conferred by the statute, is to withhold from the banking institutions a function necessary to their existence."

The opinion of Shankland, J., begins upon page 164, and that part of it relating to this question will be found on pages 164–171. Having shown that in the idea of a bank deposit there is nothing but a loan by the depositor to the bank, he continues (p. 166):

"In this last and widest acceptation of the term *deposit*, it was most probably used by the legislature of 1838; for it was well known in all commercial communities, at that period, and to all competent legislators, that *borrowing money to lend again is a part of the legitimate business of banking*. A banker is a dealer in capital, an intermediate party between the borrower and lender. He borrows of one party and lends to another, and the difference between the terms at which he borrows and lends is the source and measure of his profits. (Gilbert's Pr. Obs. on Banking, 25; 1 McCulloch's Com. Dic. 86–117.)

"I am unable to perceive any reasons of policy to deny to the banks the privilege of incurring obligation by way of loan while they can incur the like obligation by taking in deposits. In truth, the obligations we have seen are the same, except in name."

Page 169: "Although the power to borrow money may be justly predicated on the express power to receive deposits on the principles of construction above indicated, or may be found amongst the mass of unenumerated, incidental, and necessary ones, I prefer to put my opinion upon the broad ground that every corporation, unless prohibited by law, can incur obligations, as a borrower of money, to carry on the legitimate business for which it was incorporated, although not specially authorized to borrow by its charter. Such has been the uniform language of the courts in this country."

The opinion of Paige, J., begins upon page 182; that part of it relating to the borrowing power will be found on pages 209–222. On page 210, he says:

"The power of the North American Trust and Banking Company to borrow money may be maintained as an incidental power necessary to carry on the business of banking. This power has always been claimed and exercised by banks of discount in all commercial countries. In the original charter, granted in 1694 to the Bank of England (Act of 5 and 6 William and Mary, ch. 20) the power of that bank to borrow, as an incidental power, was conceded by imposing a restriction in respect to the amount to be borrowed. The same concession was made by the enactment of the several acts of the British Parliament, restraining in favor of the Bank of England, all corporations, etc., from borrowing money on their notes, payable at a less time than six months. The Scotch banks exercise this power. It is one of the principal sources of their profits, to borrow at a low rate of interest, and lend at a higher. (3 Edin. Enclyclo., tit. Bank, 220, 224; Cyclopœdia of Arts, etc., tit. Bank; 1 Chitty on Bills, 15, 16.) . . . This power was always exercised by the old incorporated banks of this state, and it has also been exercised by the banking associations since the passage of the act authorizing their formation. It has been exercised by these banks as a legitimate power of banking, and as the necessary and usual means to enable the banks to carry on the business of banking."

Page 214: "The exercise of the power to borrow money is usual in the course of the ordinary business of a bank; and it is directly and immediately appropriate to the execution of the expressly granted powers."

While Judge Selden differed with his colleagues as to the authority of the North American Trust and Banking Company to issue the securities in question, he expressly concedes that borrowing is an ordinary incident of the

banking business, his language upon that subject being as follows (pp. 255, 256) :

"The receiver's counsel takes the broad ground, that banking corporations can not borrow money, or at least, that they can not borrow to supply the place of capital. They contend that it is the business of banks to lend money, not to borrow; that borrowing does not come within the scope of legitimate banking, and is in its nature a power which corporations created for banking purposes can not properly exercise. This position is not supported by any direct authority; and a careful consideration of the nature of banking, together with an examination of its history, has satisfied me that it can not be sustained. It is not in harmony with the present practice or the past history of banks."

Then, after referring to the practice of the English country banks and the Scotch banks which has been mentioned in the citations above made, he continues:

"It can scarcely be said, in view of these precedents and authorities, that borrowing money, even to be used as capital, is not within the range of the business of banking. The position, therefore, that the acts of the banking company in issuing the paper in question, were *ultra vires*, can not be sustained on the ground that borrowing is no part of legitimate banking, but must rest on that branch of the argument which is drawn from the terms of the general banking law itself."

The conclusions of the whole Court are set forth in fourteen propositions, stated on pages 294–297. Of these, the fifth, Judge Selden dissenting, declares that the North American Trust and Banking Company had power to borrow money and to issue time paper to secure a debt for moneys loaned. In *Barnes* v. *Ontario Bank*, 19 N. Y. 152, 156, this conclusion was re-affirmed as settled law without dissent from Judge Selden.

The last of the three cases mentioned above is *Ward* v. *Johnson*, 95 Ill. 215, decided in May, 1880. There a corporation called the Farmers', Merchants', and Mechanics' Savings Bank had all the powers ordinarily given to a commercial bank, and, in truth, was such, as stated by the Court on page 243, though styled a savings bank. This corporation established what it called an investment department, whereby certificates were issued for sums of one hundred dollars and upward, bearing interest at seven and three-tenths per cent per annum, secured by a deed of trust whereunder certain specific property of the corporation was put into the hands of trustees. The corporation also did a general banking business. The bank having failed and been put into the hands of a receiver, it was contended, as in the case of *Curtis* v. *Leavitt*, 15 N. Y. 9, that these certificates were invalid because given for borrowed money. On pages 237–239, the Court speaking through Mr. Justice Scholfield, after reciting the powers of the bank, say:

"In addition to these express powers, there can be no doubt that such corporations possess, also, the implied power to borrow money." . . .

"The corporation was authorized to contract and agree with persons desiring to make deposits or loan money, as to the terms. . . . The business is simply that of a bank obtaining money, and, so far as the public was concerned, presumably needed in its business, and securing it by a trust deed upon terms mutually satisfactory to the respective parties in interest. The name is not of the slightest consequence. The transaction itself, individually considered, is neither unusual nor extraordinary."

In *Planters' Bank* v. *Sharp*, 6 Howard, 301, this Court had occasion to consider a subject so nearly allied to the one under consideration as to be almost, if not quite, iden-

tical in its legal bearings; and although the matter did not then pass into judgment because the Court preferred to rest its decision upon another ground, yet the opinion of the Court was so expressed as to leave its conclusions not open to doubt. The exact question there involved was whether the Planters' Bank had power to rediscount its negotiable paper. The majority of the Court held this power was given to it by the 6th section of its charter empowering it "to grant, demise, alien, or dispose of for the good of said bank" its "goods, chattels and effects," the 22nd section further providing that the bank should not "discount any note or notes which shall not be made payable and negotiable at said bank." While resting the decision on the express power thus given the Court further considered the nature of the banking business, and in no uncertain terms made clear that in their opinion rediscounting was but an incident of the business of banking; that it was the duty of the bank "to pay in some way every debt;" and that rediscounting was but a means to that end. Further they say (p. 323):

"It is said, in opposition to this, Why should a bank be considered as able to incur debts? or, why to do any business on credit, requiring sales of its notes or other property to discharge its liabilities? Such inquiries overlook the fact, that the chief business and design of most banks, their very vitality, is to incur debts as well as have credits. All their deposit certificates, or bank-book credits to individuals, are debts of the bank, and which it is a legitimate and appropriate part of its business as a bank to incur and to pay. The same may be said, also, of all its bank-notes, or bills, they being merely promises or debts of the bank, payable to their holders, and imperative on them to discharge."

As we have stated, rediscounting is so closely analo-

gous to borrowing that it is difficult to conceive of a course of reasoning which should sustain the one and deny the other as an incident to the banking business. The same necessity which would call the one into action would equally demonstrate the necessity for the other. Which should be adopted is simply a matter of choice for the particular bank, having in view its condition at the time action becomes necessary.

As we have quoted statutes from Massachusetts and Ohio showing the power of banks organized under the general laws of those states to borrow money, it seems proper to insert here references to decisions from the Supreme Courts of those states upon the same subject.

It came before the Supreme Court of Massachusetts in *Commonwealth* v. *Bank of Mutual Redemption*, 4 Allen, 1. Besides the statutory provisions above mentioned, others were then in force by which banks were prohibited from making contracts in any form "for the payment of money at a future day certain, or with interest, except for money borrowed of the state," or of a state savings bank, or money deposited by an assignee for creditors, "and except also that all debts due to one bank from another, including bills of the bank indebted, may draw interest." There was also a penalty imposed upon a bank which issued notes with a stipulation that they should not be put into circulation or returned to the bank for a certain time. Under these statutory regulations the defendant borrowed $40,000 from another bank, payable four days after date, and gave to that other bank $40,000 of its bank notes, with the agreement that they should not be put into circulation or returned within the four days. The state bank commissioners filed their petition to enjoin such actions, and some others which it is not necessary to mention as they relate to another sub-

ject, alleging them to be violations of the statute; and the cause was heard upon a motion to dissolve an injunction granted upon that petition. With reference to the matter of borrowing money the Court said, p. 14:

"The right of a bank to borrow money from another bank is nowhere expressly prohibited. On the contrary, the right to do so would seem to be recognized in Gen. Sts. c. 57, sec. 26, by which it is expressly provided that debts due from one bank to another, including bills of the bank indebted, shall not be considered as within the prohibition of sec. 25, which limits the indebtedness of a bank to twice the amount of its capital stock, exclusive of sums due for deposits not bearing interest. The only restraint on the power to contract such a debt is contained in sec. 63 of the same chapter, which provides that no bank shall make any contract for the payment of money at a future day certain, or with interest. This language is certainly broad enough to cover a contract by one bank with another to pay money at a future day. That it was intended to include such contracts is strongly implied from the exception to the prohibition, by which it is provided that 'all debts due to one bank from another may draw interest.' The conclusion would seem to be inevitable that the legislature, in making this provision, had in view debts due from one bank to another, and intended to bring them within that part of the section which prohibits them from being made payable on time, but to exempt them from the prohibition of drawing interest. We can see no sufficient reason for limiting this exception to any particular class of debts existing between banks. It is applicable to every species of indebtment which may lawfully be due from one bank to another. . . . So far, therefore, as the defendants entered into contracts by which they borrowed money of another bank payable at a fixed time, they violated the law; but beyond this the allegation in the information setting forth that they borrowed money of other banks payable with interest, in violation of the statute, is not sustained."

In *Sturges & Co.* v. *The Bank of Circleville*, 11 Ohio St. 153, the question involved was not so much the power of a bank to borrow money as its power to guarantee payment of a bill of exchange sold by it, and of its cashier to act for it in giving such guaranty. But in deciding this, the power to borrow, and that through the cashier, was assumed as a premise undisputed, and upon which the conclusion of the existence of the power in the case under consideration could be built. The Court say, p. 167 (*italics* ours):

"But in this case, there being nothing to show any restriction or qualification of his powers in that regard, the duties of the cashier may reasonably be understood to extend to the buying and selling, and negotiating bills of exchange, checks and promissory notes, *as well as to that of borrowing money*, as the agent of the bank. In the discharge of his duty, he is supposed to be instructed and directed, either generally or specially, by the bank, either through its board of directors or president, as the case may be."

We also add the case of the *National Bank of Commerce* v. *National Bank of Missouri*, 30 Fed. Cas. 1121, Case No. 18,310, where the power of a national bank to borrow money was considered by Judge Dillon in October, 1878, in the Circuit Court of the United States for the District of Missouri. The action was at law, the plaintiff being a bank of New York and the defendant one of St. Louis, to recover $400,000 and accrued interest, being the balance due upon a loan of $1,000,000 made by the plaintiff to the defendant. The defendant bank had suspended in June, 1877, and a receiver had been appointed by the comptroller. The plaintiff's claim was presented to the receiver, and disallowed on the ground that the money was not borrowed by the bank, but by its directors for their own benefit. In

defense to the action it was also contended "that the defendant had no right to borrow money to loan again, and that a loan of this character was illegal and known to the plaintiff to be illegal when made." The defendant having admitted at the trial that the plaintiff was entitled to recover, unless one of the two defenses above mentioned was established, assumed the burden of proof. At the conclusion of its evidence the plaintiff moved for peremptory instructions in its favor. In granting this motion, Judge Dillon said with reference to the defense of lack of power:

"I am of opinion that a national banking association has, under the national banking act (13 Stat. 99), the power to borrow money, and that the defendant bank, in the absence of fraud brought to the knowledge of plaintiff bank, had the power to enter into the contract of December 26, 1866, which is the foundation of this action. The legal power of the bank to borrow money does not depend upon any exigency or upon the existence of a critical condition of its affairs, or upon an actual necessity for the immediate use of the sum borrowed. It may borrow money to conduct and carry on the business of banking, and it may borrow for the express purpose of lending the same, either by discounting the notes, bills, etc., of others or on personal security, with a view to profit by the transaction. The loan of money to a national bank is not invalid because the lender may know or have reason to believe that the borrowing bank intends to lend it, when received, to others. A national bank may lend its money to its directors as well as to other persons, provided it acts in good faith and does not exceed the limitation to any one person or director of 'one-tenth part of the amount of the capital stock of the association actually paid in.' There is no claim that the limitation was exceeded in this case, as the capital stock of the bank was $3,410,000 actually paid in. If the law were that a national bank could not borrow money for the purpose of lending the same again to its

directors, and that if the lender knew that such was the purpose of the borrowing bank, the transaction would necessarily be invalid, I admit that the evidence in the case is such as to justify the court to submit the question of the plaintiff's knowledge of such a purpose to the jury. But I am of the opinion that where no fraud is intended a national bank may lend its money to its directors, and the fact that the lender knows, or has reason to believe, that when the money he lends is received it will be lent to the directors, does not, unless he knows, or has good reason to believe, that a fraudulent use or disposition of it is contemplated by the directors when received, invalidate the transaction. The directors had no more power over the $1,000,000 obtained under the contract in suit than they had over the $1,000,000 which the defendant bank had on ordinary deposit with the plaintiff bank, or over the $3,000,000 of capital actually paid in. A lender can not knowingly aid an intended fraud, but he is not required not to lend because the borrowing bank may misuse their powers."

Upon the other defense he held that the evidence did not tend to show that the plaintiff was cognizant of any intended fraud.

The jury having returned a verdict in favor of the plaintiff for $445,582, under the instructions of the Court, and judgment having been entered thereon, a writ of error was afterwards sued out to this Court, as stated in the foot-note to the report. But as the files of this Court show this writ was subsequently dismissed under a stipulation of counsel, the judgment thus rendered was ultimately acquiesced in.

As stated above, other cases illustrating the judicial recognition which has been made of the power of banks to borrow money, will be mentioned later in discussing other propositions. To these we refer now, without stopping to quote from them. Indeed, after a thorough search, we

can say that we have found but one case or reference thereto, aside from the decision in the case of the *Western National Bank* v. *Armstrong*, wherein it was intimated that borrowing money was not an ordinary incident of the banking business. That single instance is the decision of Judge Blodgett, of the Northern District of Illinois, in the case of *Adams* v. *Cook County National Bank*. His opinion seems never to have been printed; at least, we have been unable to find it, and it has escaped the vigilance of the editor of the new series of federal reports, known as "Federal Cases." Wherever it is mentioned, reference is made to Ball on National Banks, page 54, a work published in 1881, as the primary publication. The opinion is there stated to be in manuscript, and nothing is given to show the nature of the case, what questions were before the Court, or whether the language upon this subject was decision or *obiter*. All that is said is the following:

"The power of a national bank to borrow money or to give notes is neither expressly nor impliedly given by the act. The business of the bank is to lend, not to borrow money; to discount other's notes, not to get its own notes discounted. A bank, under certain circumstances, might become a temporary borrower of money on time; yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the agent acting for the bank had special authority to borrow money. The burden of proof in such cases would be upon the lender."

EVIDENCE OF PRESENT USAGE.

It was shown by the testimony of seven experienced bankers of New York and six of Cincinnati that prior to the decision of this Court in the *Western National Bank case* it was an ordinary and usual incident in the banking busi-

ness for one bank to borrow from another; that by custom and usage it was within the scope of the authority of each of the executive officers of a bank—president, vice-president if actively engaged in the conduct of the bank, and cashier—to make application for such a loan; that they were never required to furnish any proof of their authority to make the application either in the form of a resolution of the board of directors of the borrowing bank or otherwise; and that the loan would be made either by rediscounting the negotiable securities offered by the borrowing bank (as was done in *Auten, Receiver*, v. *United States Nat. Bank*, No. 206 of this court's docket, October term, 1898), or by discounting the note of its officers (as was done in *Scott* v. *Armstrong, Receiver of Fidelity Nat. Bank*, 146 U. S. 499), or its own note, or by a mere credit (as in the case at bar), upon the faith of the correspondence, sometimes fortified by the note or certificate of deposit of the borrowing bank. When the transaction was not a rediscount, the borrowing bank usually gave collateral security,—which produced the same result; and the proceeds in either case were, as in the case at bar and others above mentioned, credited to the borrowing bank in its account with the lending bank upon the books of the latter, so that they could be drawn out only by checks of the officers of the borrowing bank in the regular course of business.

This testimony was summarized in the opinion of the Court below (Rec., pp. 334–337), and is absolutely uncontradicted. We shall not undertake, therefore, to quote it *verbatim*, but shall content ourselves with giving the names of the witnesses, with a statement as to their experience and a reference to the pages of the record where their evidence begins, and with quotations from two of the witnesses of each city as to the commonness of such transactions. The witnesses upon the subject were: M. M.

WHITE, an officer for the last twenty-one years of the Fourth National Bank of Cincinnati as cashier and president (Rec., p. 165); W. S. ROWE, engaged in banking business in Cincinnati for twenty-two years, and a cashier since 1881 (Rec., p. 186); H. C. YERGASON, who has been continuously for twenty-eight years cashier, vice-president, and president of the Merchants' National Bank of Cincinnati (Rec., p. 192); G. P. GRIFFITH, cashier and vice-president continuously since 1866, and for three years prior to that time assistant cashier (Rec. p. 195); J. D. HEARNE, president of the Third National Bank of Cincinnati since January 1882, and for eleven years prior to that president of banks in Covington, Kentucky (Rec., p. 200); WM. A. GOODMAN, a cashier, vice-president, or president ever since 1858 (Rec., p. 184)—all of the above being of Cincinnati; also the following of New York City: WM. J. QUINLAN, cashier since 1878 of the Chemical National Bank (Rec., p. 121); GEORGE G. WILLIAMS, cashier of that bank from 1855 to 1878, and since then its president (Rec., p. 129); DUMONT CLARK, with the American Exchange National Bank as assistant cashier, cashier, vice-president, and president, since 1868 (Rec., p. 134); A. P. HEPBURN, superintendent of the Bank Department of the State of New York from 1880 to 1884, then national bank examiner for over three years, comptroller of the currency from 1889 till 1893, and then president of the Third National Bank of New York City (Rec., p. 136); EDWARD TOWNSEND, cashier of the Importers' and Traders' National Bank for over fifteen years (Rec., p. 148); GEORGE F. BAKER, president of the First National Bank of that city, and connected with it for over thirty years as teller, cashier, and president (Rec., p. 150); and FREDERICK D. TAPPAN, cashier of the Gallatin National Bank for eleven years, and then its president for twenty-seven years (Rec., p. 151).

M. M. WHITE says (Rec., p. 165) :

"Q. 6. Mr. White, can you tell us whether or not, prior to the decision of the Supreme Court of the United States, in the case of the *Western National Bank* v. *Armstrong, Receiver of the Fidelity National Bank*, in the spring of '94, it was considered an unusual or a usual thing for one bank to borrow money from another?

"A. It was a usual occurrence for them to do so; being regarded as legitimate in the line of banking business."

(Rec., p. 168.) "XQ. 3. What kind of loans do you refer to, Mr. White, as ordinary loans?

"A. Well, where a bank is short in money, and long in bills, as frequently occurs, it is legitimate and proper to discount those bills and build up the cash of the bank. It is not an unusual thing for a bank to discount freely in anticipating the withdrawal of deposits. You can't pay a check with notes; and the only thing to do, where you are long on bills and short on cash, is to discount these bills—lessening your bills receivable, and thereby increase your cash; which I refer to as legitimate banking."

W. S. ROWE says (p. 187) :

"Q. 13. Mr. Rowe, was the borrowing of money by one bank from another an extraordinary thing in the banking business?

"A. No; the country banks often did it—borrowed from us.

"XQ. 1. Mr. Rowe, what proportion of these cases was the rediscount of paper loaned [owned?] by the bank?

"A. It was pretty hard to tell. Probably fifty to sixty per cent of it."

"XQ. 2. And then nearly half of it was actually loaned?

"A. Yes. Some of the country banks buy the securities of their own cities, or towns, or counties, and hold them to get money on, really, at certain seasons of the year when they need it, because those securities are better known. It is a class of securities that is better

known in the city than the paper they get, especially in the farming communities."

(Rec., p. 191.) "RDQ. 19. You spoke to Mr. Herron here about country banks borrowing money, Mr. Rowe. What class of banks do you designate as country banks?

"A. Banks in small places; the cities in the South, for instance; there are certain seasons of the year, during the moving of the crops—the cotton crops, for instance—when they need money to move the crop, and the banks borrow moneys to let their customers have, to move the crops. And the banks up in Ohio, in the agricultural districts, borrow money at certain seasons; up in the large wheat and corn countries; their customers will want money to buy cattle and stock with; and they frequently want more money than the country bank has, and we loan them the money on their municipal or other bonds, and carry the transaction until the crops or cattle are sold."

DUMONT CLARKE says (Rec., p. 134):

"Q. 8. Prior to the decision of the *Western National Bank* against *Armstrong*, by the Supreme Court of the United States in the spring of 1894—if I recollect right—was it, or was it not, a usual thing for a bank to borrow money?

"A. Yes, sir; very common occurrence.

"XQ. 1. In what shape was this borrowing made?

"A. Usually in the light of rediscounting the bills receivable; at times, however, collateral was furnished to us.

"XQ. 2. What evidence of such indebtedness was it usual to take?

"A. Simply the paper which they had discounted with the indorsement of the bank upon its back; at other times we would take a collateral note made by the bank; at other times a certificate of deposit made by the bank—in the last two cases collateral would be attached to such instruments."

A. B. HEPBURN says (Rec. p. 137):

"Q. 9. Do you know whether or not it was a usual thing for banks to borrow money from other banks prior to the decision by the Supreme Court of the United States in the spring of 1894, in the case of the *Western National Bank* against *Armstrong?*

"A. I do. It was usual."

This evidence is confirmed by information to be gathered from the reports of the Comptroller of the Currency to Congress, which, though they are not embodied in the record, will receive judicial notice because they are reports of a principal executive officer made to Congress pursuant to law. Rev. Stat. of U. S., sec. 333; *Heath* v. *Wallace*, 138 U. S. 573–584. On page 115 of vol. 1 of the Comptroller's report, made December 4, 1893, is given a consolidated statement of the conditions of national banks on October 3, 1893, from which it appears that the notes and bills rediscounted by banks in reserve cities other than New York, Chicago and St. Louis, as shown by the returns to the Comptroller, amounted on that day to $3,137,972, and their bills payable to $10,556,104; and that in the national banks not in reserve cities the notes and bills rediscounted then amounted to $17,928,765, and their bills payable to $16,628,834. On pages 254–275 of the same report will be found consolidated statements of the national bank returns to the Comptroller of the Currency for every year from 1863 to 1893, inclusive. Prior to 1869 notes and bills rediscounted, and bills payable, were not separately itemized, but in that year the separation began; and it will be seen that thereafter the amount of each item was never less than one million, and was generally several millions of dollars. During the years 1886 and 1887, which we choose because nearest to the transaction in question, the amount

of notes rediscounted ranged from $7,556,837.10 to $17,312,806.39; and the bills payable from $1,145,240.26 to $5,105,112.57. The amount of these loans afterwards greatly increased, with some fluctuations, until in July, 1893, it came to more than *sixty millions of dollars*, which was in round numbers ten per cent of the entire capital stock, forty per cent of the entire circulation, four per cent of the entire individual deposits, and three per cent of the entire loans and discounts, of all the national banks then reporting. This statement alone seems sufficient to show that borrowing money otherwise than by circulation or deposit is a normal and usual feature of the banking business. It is a standing resource of which banks avail themselves, as a matter of course, where profit offers, or occasion justifies their so doing.

To sum up the historical and oral evidence we have adduced, the very essence of the banking business, the corner-stone upon which it is built, is the power and ability to borrow money. As Professor Dunbar says (Chapters on Theory and History of Banking by Charles P. Dunbar, Professor of Political Economy in Harvard University, p. 24): "The bank being then obliged to extend its operations beyond the amount of its capital, is compelled for this purpose to make use of its credit. In fact, it is only by such a use of its credit that the establishment becomes in reality a bank." When it issues its circulating notes it borrows money. When it receives money on deposit upon a drawing account, again it borrows money. When instead of creating a drawing account it gives to the lender a certificate of deposit, again it borrows money. When it sells exchange, its own draft upon its correspondent in a different place, again it merely borrows money. Its sole aim and object is to borrow money that it may make a profit by lending it again.

From the beginning of the history of incorporated banks this feature of their business has been recognized. They have borrowed, and have been authorized to borrow, with interest as well as without; on time as well as on demand. Borrowing being the essential feature of a bank's existence is incidental to that business in all its branches. The terms on which the loan is made are matters of indifference in the absence of statutory prohibition; they become simply a matter of discretion as to the best method of conducting the business. And so, while some banks decline to pay interest upon deposits, others deem it to their advantage to swell their deposit accounts by allowing interest. In this lies the solution of the question we are concerned with. It is merely whether a bank in the ordinary conduct of its business may hire money, may pay to him who lends—for it always borrows—a consideration for the lending other than the mere promise to repay. We submit there can be but one answer to this question. The object of banking being to make profits by lending money, it is simply a question for the managers of the bank as to whether the greater profit will be reaped by hiring money than by confining itself to the use of that which demands no reward other than the promise of repayment.

At some times and in some places the money borrowed by the banks from their depositors without interest can all be lent again to their customers. But this is not always the case. At times more money is so deposited that the bank can lend again to those doing business with it; in such case the money borrowed by it must lie idle or seek some other than the usual channel of use. At other times, the money so deposited is not sufficient to meet the legitimate demand upon the bank for loans; in such case it must hire money elsewhere, or forego a legitimate profit within its reach. The situations just depicted are not ex-

traordinary, but normal, in certain places; that is to say, agricultural communities have ordinarily a glut of money deposited in the banks, while manufacturing communities have ordinarily an excessive demand for loans from the banks—excessive in the sense that the demand for loans in a community exceeds the money deposited by that community. Again, in agricultural communities in this country, as is well known, there is a certain season when the amount of money there circulating is insufficient to transact the business; at that season, known as the time for "moving the crops," the banks in agricultural communities must seek other funds than those lent to them by their own depositors. Hence it comes about that banks in the regular, ordinary, legitimate course of their business have occasion to borrow, and do borrow, money from other banks. At one point the demand for money is slight; at another it is great. The bank at the latter borrows from the bank at the former, and the equilibrium is restored. This borrowing may be by giving what is primarily the obligation of the borrowing bank, or by rediscounting notes it has already discounted. In either case the result is the same. Money is borrowed which the borrowing bank obligates itself to repay.

To say, therefore, that borrowing money is not a legitimate part of the banking business, is utterly to misconceive the nature of that business. The very breath of a bank's life depends upon its power to borrow money. That power failing, either from legal disability or from financial distrust, the bank is doomed. Able to borrow, it is able to lend again and to make money. If it pay interest to depositors, it may secure a larger volume of deposits, do a larger volume of business, and make larger profits. And if it may borrow at interest from one person or class to swell its deposit account, or the funds usable for its busi-

ness demands, it may from another. How it borrows and whence it borrows are not material; it matters not whether it borrow on deposit credited to the lender upon its books, or on its note or indorsement which the lender takes with him, or on its assurance, written or verbal, that the money will be repaid; all come to the some end. The essence is, the bank must borrow that it may lend again.

II. NATIONAL BANKS AUTHORIZED TO BORROW.

It remains to consider whether there is any thing in the National Banking Act which prohibits associations organized thereunder from exercising this power of borrowing, which we have seen to be incidental to the banking business, or limits it in such a way as to defeat the loan involved in the case at bar.

The national banking system was inaugurated by the act of February 25, 1863, 12 U. S. Stat. at Large, 665. The general powers granted to associations formed under that act are stated in sec. 11. We have said that this part of the present National Banking Act, of which that section was the prototype, was adapted from the New York General Banking Act, c. 260 of the laws of 1838; the analogue of sec. 11 of the act of 1863 is found in sec. 18 of the New York act. To show the closeness of the adaptation we shall make one quotation serve for both, words found in this portion of sec. 11 of the Federal act of 1863 and not in sec. 18 of the New York act being printed in *italics*, and words found in the New York act and not in the Federal act of 1863 being enclosed in brackets.

Each provides that associations organized thereunder "shall have power to carry on the business of banking, *by obtaining and issuing circulating notes in accordance with the provisions of this act;* by discounting bills, notes, and other

evidences of debt; by receiving deposits; by buying and selling gold and silver [,] bullion, foreign coins, and bills of exchange, *by loaning money on real and personal security*, in the manner specified in their articles of the association, for the purposes authorized by this act; [by loaning money on real and personal security;] and by exercising such incidental powers as shall be necessary to carry on such business."

The act of 1863, not proving sufficiently attractive to banking capital, was remodeled by the act of June 3, 1864, 13 U. S. Stat. at Large, 99. Sec. 8 of that act was the equivalent of sec. 11 of the preceding act. The subject embraced within the provision above quoted was embodied in the subsequent revision of the United States Statutes as the seventh clause of sec. 5136. Some slight changes were made in that revision, and to show these, as well as to make the history complete, we again make one quotation serve for both, printing within brackets such words as are found in the Revised Statutes which were not in the act of 1864, and in *italics* those which were in the act of 1864, and not in the Revised Statutes.

Such association "*may* [shall have power] . . . [Seventh—To] exercise *under this act* [by its board of directors, or duly authorized officers or agents, subject to law,] all such incidental powers as shall be necessary to carry on the business of banking [;] by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by lending money on personal security; [and] by obtaining, issuing, and circulating notes, according to the provisions of this *act* [Title]."

As the act of 1863 follows almost *verbatim* the New York act of 1838, it must be presumed that Congress in adopting the latter act adopted also the well known and

settled construction which, in *Curtis* v. *Leavitt*, 15 N. Y. 9, and *Barnes* v. *Ontario Bank*, 19 N. Y. 152, 156, had previously been given to it by the Court of Appeals of New York; *McDonald* v. *Hovey*, 110 U. S. 619, 628; *Willis* v. *Eastern Trust & Banking Co.*, 169 U. S. 295. The act of 1864 and the Revised Statutes have inverted the order of the phrases, and have placed the grant of incidental powers at the beginning instead of at the end of the clause; and in the revision a confusing semi-colon was inserted after the word "banking". It needs but little reflection to satisfy the mind that these changes do not signify a change of meaning.

In the first place, as to the change in punctuation, it is a well-known rule that punctuation neither makes nor mars a statute; *Hammock* v. *Loan and Trust Co.*, 105 U. S. 77, 84. Particularly is this true when the statute is but a revision of previous enactments; *United States* v. *Le Bris*, 121 U. S. 278; *United States* v. *Lacher*, 134 U. S. 624.

In the second place, the act of 1864 was, so far as this branch of it was concerned, manifestly but a revision of that of 1863; and the rule just referred to as to the construction of revising statutes applies as well to a mere change of order as to change in punctuation.

Again, to suppose that the change of order signified a change of construction would be to affirm that the specific powers mentioned were themselves incidental to the business of banking, and, in grammatical phrase, were used in the act of 1864 as in apposition to the words *incidental powers*. But these powers specifically named are not incidental to the business of banking; they are themselves different branches of that very business. An institution may be a bank by having one or more of these powers and without having all of them; but if it have none of them, it can not be a bank. A bank may be a bank of discount, or

of deposit, or of exchange, or of circulation; or it may have all of these powers or only some or one of them. In each case, with the specific grant of power denoting the kind or species of banking business it is to do, would follow the power to do all things incidental to that kind of banking business. The act of 1864 therefore does not differ in legal effect from that of 1863. In each case associations were authorized to do the various kinds of banking specifically named, and all other things that would be incidental thereto. By the change of order it was not intended to signify that the principal was considered as merely an incident, and to limit the powers given by the act of 1863 to the measures specifically named in that act and in the act of 1864.

This conclusion, reached from consideration of the subject-matter and the words used, is confirmed by the proceedings in Congress during the passage of the act of 1864. As already stated, the act of 1863 had not accomplished all that had been desired. The reports of the Comptroller of the Currency show that by April 4, 1864, only 307 national banks had been organized, with an aggregate capital stock of a little over $42,000,000. Banking capital had not been tempted to this new form of investment. It was necessary to revise the scheme and to enlarge rather than to limit the powers given to the banking associations. For this purpose the act of 1864 was originally introduced in the House of Representatives on March 14, 1864, as House Bill No. 333; meeting with much opposition in that form, and having been tabled on April 6, it was reintroduced in a form modified to meet the objections made (none of which touched the subject under discussion) on April 11 as House Bill No. 395. This bill was speedily passed in the House, but received more deliberate consideration in the Senate. The bill having been reported

from the Senate finance committee by Senator Sherman, was explained by him on April 26, 1864, with an indication of the changes made from the act of 1863 and the reasons for them. We quote from his remarks as reported in the Congressional Globe, 38th Congress, First Session, p. 1865:

"Nearly all the provisions contained in this bill are contained in the act of last year. There are many changes, however, but they are changes of detail, transposition, verbal modifications which are found to be necessary in order to make the law of last year effective and easy of execution. There are, I believe, but six or seven important propositions contained in the new bill that will be likely to excite the attention of the Senate, and I will name them in order to call the attention of Senators to them, so that they may see the difference between this measure and the measure that was passed a year ago."

He then specifies the following subjects:

1. Under the old law banks redeem their bills at their own counter only; under this bill at one of some other places named by the Comptroller of the Currency.

2. The authority of the states to tax property of national banks, before obscure, is by this bill clearly limited and defined.

3. The bill provides for converting state banks into national banks.

4. A change had been made in the rate of interest which such banks might charge; but this change had not met the approval of the Senate finance committee, and they had recommended a restoration of the former provisions on that subject.

5. New provisions as to bonds as a basis for circulation.

6. New provisions as to the denomination of circulating notes.

He then says: "These, I believe, are all the important modifications of the system." Neither in the House nor in the Senate was there any debate at all upon the change in form in this section, and the conclusion is, we submit, irresistible that it was looked upon as a mere matter of detail and revision without purposed change of meaning.

Under each act it was intended to grant the power to do certain specific branches of the banking business, and such other things as were incidental thereto; in the earlier act the incidental clause was written at the end, and in the latter in the beginning. Where it should go is a matter merely of taste in composition. For ourselves, we submit that Judge Sage was correct when he said, in deciding this case in the Circuit Court, that the present form, "though clear, is not put in a strictly logical order. Without changing its meaning it might be paraphrased so as to read," as expressed in the act of 1863 (Rec. p. 314). To the same effect is the opinion of the Supreme Court of Ohio in *Shinkle* v. *First National Bank*, 22 Ohio St. 516, 524, where they said, referring to this provision as it is found in the act of 1864 (*italics* theirs):

"The words, 'by discounting promissory notes, drafts, bills of exchange,' etc., contained in that section, are not to be read as limiting the modes of exercising the *incidental powers* granted, but as limiting and defining the *kind of banking* which is authorized by the act. In other words, the association is authorized by section 8 to carry on '*banking* by discounting and negotiating promissory notes, drafts, bills of exchange,' etc., and to exercise '*all* such incidental powers as shall be necessary' for that purpose."

So if this were all that were to be found in the National Banking Act upon this subject, we should claim with confidence that the right to borrow existed as inci-

dental to the powers expressly given, and should need only to refer to the prior history of the act and of the banking business as to how and by what officers or agencies those express powers had usually been exercised, to maintain our proposition.

But this is not all. The third clause of Rev. Stat., section 5136, gives national banks power "to make contracts"; and Rev. Stat., section 5202, recognizes the borrowing of money as among the contracts which can thus be made, for that section says:

"No association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserve profits."

It will be observed that this clause is modeled upon and copied almost *verbatim* from those found in the Ohio acts referred to on page 37, *supra*; also that the excepted liabilities which may be without limit include all those which could be made by a direct exercise of the powers specifically granted by clause 7 of sec. 5136. Hence it follows necessarily that this section, as did sec. 26 of the act creating the Bank of England, *supra*, p. 29, and par. 9 of sec. 7 of the act creating the first Bank of the United States, *supra*, p. 31, and other statutory provisions already mentioned, recognizes the existence of the power to borrow,

and that by means other than those specifically defined in sec. 5136, by putting a limit upon it. And as the limitation is that "no association shall at any time be *indebted*, or in any way liable," it covers not merely indirect liabilities by contracts of indorsement or guaranty, such as were sustained in *People's Bank* v. *National Bank*, 101 U. S. 181, but the direct creation of an indebtedness—in short, borrowing money.

And so these provisions have beretofore been construed. In *Eastern Townships Bank* v. *Vermont National Bank*, 22 Fed. 186, where a national bank had agreed to pay interest at six per cent as a consideration for a deposit of $50,000, and this indebtedness had been disallowed by its receiver as being without the scope of its corporate powers, Wheeler, J., said, p. 188:

"It bore interest like a loan. If it was a loan, then the question is as to the power to borrow money. Among the powers of such banks specially named is that to make contracts. Section 5136, subd. 3. There is no apparent limit to this power, except that contained in section 5202. That section provides that no association shall at any time be indebted or in any way liable to an amount exceeding the amount of its capital stock actually paid in and undiminished, except for circulation, deposits, and drafts drawn against existing funds, and to its stockholders. This implies that it may become indebted within the limit, even if the power to make contracts generally should be held to apply to something else. Powers impliedly given are as well conferred as those expressly given. *National Bank* v. *Graham*, 100 U. S. 699."

This construction was approved by the Circuit Court of Appeals for the Ninth Circuit, McKenna and Gilbert, Circuit Judges, and Hawley, District Judge, in *Weber* v. *Spokane National Bank*, 29 U. S. App. 97; 64 Fed. 208,

where it was also held,—following the analogy of *National Bank* v. *Matthews*, 98 U. S. 621, upon sec. 5136, of *Gold Mining Co.* v. *National Bank*, 96 U. S. 640, upon sec. 5200, and of *National Bank of Xenia* v. *Stewart*, 107 U. S. 676, upon sec. 5201,—that breach of the limitation did not affect the validity of the loan, but merely furnished cause for forfeiture of the charter, thus inserting by intendment the express provisions found in the acts relating to the Bank of England, the Banks of the United States, and in the Massachusetts Statutes above referred to.

In *First National Bank* v. *Exchange National Bank*, 92 U. S. 122–127, this Court, after quoting Rev. Stat., sec. 5136, par. 7, said:

"Authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others. Its own obligations must be met, and debts due to it collected or secured. The power to adopt reasonable and appropriate measures for these purposes is an incident to the power to incur the liability or become the creditor. , . . Banks may do, in this behalf, whatever natural persons could do under like circumstances."

This we submit, fully sustains our contention, and concedes that national banks may borrow money as fully and as freely as other banks of issue, deposit, discount and exchange.

In *Western National Bank* v. *Armstrong*, 152 U. S. 346, the Court referred to and quoted part of this passage, and expressed no intent to limit its doctrine. Indeed the power

of a national bank to borrow money under certain circumstances was expressly conceded. But the Court assumed that the exercise of this power was an extraordinary and not an ordinary incident in the banking business. No examination of the subject is made in the opinion, and the language used seems to have been taken almost *verbatim* from the opinion of Judge Blodgett in *Adams* v. *Cook County National Bank*, as quoted in Ball on National Banks, 54 (*supra* p. 69). Our effort has been to bring to the attention of the Court other sources of information, and to show that the assumption of Judge Blodgett, followed without discussion in the *Western National Bank* case, is contradicted by the whole history of banking, in conflict with the actual practice of banks at the present day, opposed to the weight, and otherwise uniform tenor, of judicial opinion, and overlooks the implied grant of power necessarily following from Rev. Stat., sec. 5202. If we have not succeeded in this effort, then our labors on this branch of the case, though not light, have been in vain. But if we are right, then the statement we so earnestly but respectfully controvert is based upon an error of fact and is not conclusive upon this Court in any other cause, and should not be allowed to prejudice the rights of other persons. We submit that banks having the powers given expressly by Rev. Stat., sec. 5136, and inferentially by sec. 5202, are authorized to borrow money, in large sums or in small, with interest or without, on time or on demand, by deposit, by note, by bill, by bond, or by any other form of contract; and that such transactions are not presumptively out of the course of ordinary and legitimate banking. Whether any particular transaction is without that course is to be determined by the circumstances attending it. No inflexible rule can be laid down which will be applicable to all circumstances and all conditions. But the power

being general, and its use regular, it is to be presumed, *prima facie*, in any particular case that it was properly used, and the burden is on him denying to show the contrary.

III. HOW BORROWING POWER EXERCISED.

As a national bank is an ideal being only, it can act only through others. If it borrows, it must borrow through agents; agents must effect the loan, though in the name of the bank. What agents? The statute says that the bank shall exercise all its powers, principal and incidental, "by its board of directors, or duly authorized officers or agents;" (Rev. Stat., sec. 5136, par. 7). Waiving the question, because not necessary for our case, whether this is a direct grant of power to the officers,—as to which see *Briggs* v. *Spaulding*, 141 U. S. 132, 144–146,—we shall assume that the board of directors is the sole source of authority.

But as that board is a collective body, manifestly it also can not act directly in effecting a loan. It may resolve; but what it resolves must be communicated by others. It also must act through authority delegated to others. And it may delegate not merely ministerial authority but discretionary power as well. Instances are furnished by the cases of *Fleckner* v. *Bank of the United States*, 8 Wheaton, 338; *Merchants' Bank* v. *State Bank*, 10 Wall. 604; *Ridgway* v. *Farmers' Bank of Bucks Co.*, 12 S. & R. 256; and *Burrill* v. *Nahant Bank*, 2 Met. (Mass.) 162. Others have been given in the cases already referred to in discussing the nature of the borrowing power; and still others will be found in the cases yet to be mentioned.

How should this delegation be shown? We believe the following analysis shows all the ways in which a board of directors can delegate its powers; and that by these

methods or one of them it can delegate any or all of its powers in the transaction of business.

(1.) By special warrant or resolution for the particular occasion.

(2.) By general warrant expressly given by by-law or resolution.

(3.) By general warrant impliedly given as shown by

(*a.*) Custom judicially known.

(*b.*) Custom proved as a fact.

(*c.*) Abdication by the directors.

We do not pretend that in the case at bar there was any warrant by express resolution either special or general authorizing this loan.

But we do contend that there was an implied warrant shown by each of the methods above mentioned; and that for transactions like that here in question an implied warrant is just as effectual as an express one. For, as this court unanimously said in *Mining Co.* v. *Anglo Californian Bank*, 104 U. S. 192, 194, speaking of the delegation by a board of directors of authority to negotiate loans (*italics* ours):

"*It is settled law* that the existence of such authority in subordinate officers may be shown otherwise than by the official record of the proceedings of the board."

Custom.—Custom is the root and source of all unwritten law. In its early stages it must be proved like any other fact. But if general in its nature, after being several times proved it becomes so well known that courts take judicial notice of it. An interesting illustration of this process is furnished by the oleomargarine cases recently decided by this court; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1.

Custom has clothed certain agents with certain powers.

And whoever employs such an agent is presumed to give him all the powers usually attached to his agency; if he would not do so, he must bring home to him who deals with the agent, notice of the restriction he would impose; otherwise the presumption becomes conclusive. Story on Agency, secs. 57–60, 73.

All business contracts are presumed to be made, all agencies are presumed to be granted, with reference to the usages of trade affecting that business or agency. And those usages are determined and found to exist not merely from what the Court may know judicially, but from evidence adduced to prove them.

So in *Ekins* v. *Macklish*, Ambler, 184, Lord Hardwicke received evidence to show a usage of trade whereby a factor to collect rent under a charter party for a ship had authority also to sell bills of exchange received in payment of such rent.

In *Noble* v. *Kennoway*, 1 Douglas, 510, Lord Mansfield and his associates upon the King's Bench in an action upon a marine policy insuring ships until they had arrived at their port of discharge and been moored there twenty-four hours, and their cargo until discharged and safely landed, received evidence to show a usage of trade to delay discharging cargo for the purpose of fishing.

In *Adams* v. *Pittsburg Insurance Co.*, 95 Pa. St. 348, the Court held evidence should be received to show a usage authorizing the captain of a vessel to give notes at its home port for insurance premiums.

And in *Crain* v. *National Bank*, 114 Ill. 516, where a private bank was sued upon a note given by its cashier in its name for money which he embezzled, the Court held evidence should be received to show it was customary for banks in that place to borrow money on time, as tending to

show such borrowing was within the scope of the duties of the cashier.

The directors of a commercial corporation are presumed to know the acts usually performed by each of the officers of such a corporation. And if by the custom of the trade an incumbent of an office is commonly considered as authorized to buy or sell goods, to give or discount notes, to borrow money, or to do any other act upon behalf of his corporation, then by appointing a person to that office they clothe him with apparent authority to do each of those acts which holders of like offices are accustomed to do.

The directors of a bank are conclusively presumed to know not merely the rules affecting the banking business which have been crystallized into law, but the usages of that business in the places where the bank transacts it, not only in the home city, but in those of its ordinary correspondents. And whatever powers the board may expressly by resolution confer upon the officers of the bank, it is presumed to confer as well not only the powers which the law has declared to be inherent in those offices, but those which the usages of banking in those places have affxed to them. And these presumptions are conclusive in favor of any one dealing with the bank to whom notice of a limitation placed by the directors upon the powers of officers is not brought home.

Therefore, in *Minor* v. *Mechanics' Bank*, 1 Peters, 46, 70, this Court, speaking through Mr. Justice Story, held that it would be error to refuse an instruction that the assent of the directors might be assumed to actions of the cashier according to the usage of banking, and which the directors could have authorized, though there was no proof that the specific actions were actually known to them, saying:

"The point of the instruction is, that the established usage and practice of the bank for a long period, known to the president and directors, does afford a presumption of the approbation, assent, and acquiescence of the president and directors, as to such usage and practice; though the balances resulting therefrom, were not formally communicated to the directors. From the shape of the prayer, it is undoubtedly meant that such usage and practice was known to the president and directors, as a board, and in their official character, and received their approbation as such. In a general view, with reference to the principles of the law of evidence, we are not prepared to admit, that such a presumption could not ordinarily arise. The ordinary usage and practice of a bank, in the absence of counter proof, must be supposed to result from the regulations prescribed by the board of directors; to whom, the charter and by-laws, submit the general management of the bank, and the control and direction of its officers. It would be not only inconvenient, but perilous, for the customers, or any other persons dealing with the bank, to transact their business with the officers upon any other presumption. The officers of the bank are held out to the public as having authority to act, according to the general usage, practice, and course of their business; and their acts within the scope of such usage, practice, and course of business, would, in general, bind the bank in favour of third persons possessing no other knowledge. In the case of the *Bank of the United States* v. *Dandridge*, 12 Wheat. 64, the subject was under the consideration of this Court; and circumstances far less cogent than the present to found a presumption of the official acts of the board, were yet deemed sufficient to justify their being laid before the jury, to raise such a presumption. If, therefore, the usage and practice alluded to, in the instruction, were within the legitimate authority of the board, and such as its written vote might justify, there would be no question, in this Court, that it ought to have been given."

And in *Insurance Co.* v. *McCain*, 96 U. S. 84, 86, this Court, speaking through Mr. Justice Field, said:

"The law is . . . plain, that special instructions limiting the authority of a general agent, whose powers would otherwise be co-extensive with the business entrusted to him, must be communicated to the party with whom he deals, or the principal will be bound to the same extent as though such special instructions were not given."

And in *Case* v. *Bank*, 100 U. S. 446, 454, this Court, speaking through Mr. Justice Clifford, said:

"Cashiers of a bank are held out to the public as having authority to act according to the general usage, practice, and course of business conducted by such institutions; and their acts, within the scope of such usage, practice, and course of business, will, in general, bind the bank in favor of third persons 'possessing no other knowledge.' *Miner* v. *Mechanics' Bank of Alexandria*, 1 Pet. 46.

"Neither the public at large nor third persons usually have any other knowledge of the powers of a cashier than what is derived from such usage, practice, and course of business; and it would be the height of injustice to hold that the bank, as the principal to the cashier, may set up their secret and private instructions to the officer, limiting his authority in respect to a particular case, and thus to defeat his acts and transactions as such agent, when the party dealing with him had not and could not have any notice of the secret instructions. Story, Agency (6th ed.), sec. 127.

"Such an officer is *virtute officii* intrusted with the notes, securities, and other funds of the bank, and is held out to the world by the bank as its general agent for the transaction of its affairs, within the scope of authority, evidenced by such usage, practice, and course of business."

These principles are so familiar it surely is not necessary for us to add further citations to those made by the Court below (Rec., pp. 345, 346).

In the case at bar the negotiation for the loan was by correspondence conducted on the part of the borrowing bank by its vice-president. The evidence shows that the vice-president was the active controlling officer of the bank; in fact, though not in name, its president. With the original application for the loan was transmitted a certificate of deposit, signed by the cashier. Either this certificate was regularly issued for a deposit actually made, or it was not, but simply for the purpose of evidencing this loan. If it was regularly issued for an actual deposit, the Chemical Bank is entitled to recover upon that certificate, and the discussion must stop there. If it was not so issued, then the cashier as well as the vice-president, was acting for the borrowing bank in requesting the loan. Therefore, we have, at worst, the case of the acting president and the cashier of a bank requesting that bank's correspondent and reserve agent to make it a loan. And the question is whether authority to present such a request and to affect such a loan falls within the scope of the duties of those officers, or either of them, as established by the usage of banking, either as judicially known or as proved to exist in the cities where the two banks did business.

The cashier is the ostensible executive officer of the bank. Through him the bank confers with the outside world. Through him the board of directiors make known to its customers its demands and requirements, its special usages and practices. They are its brain; he its mouth as well as its hand.

The president, or officer acting as president, is superior in dignity to the cashier, and may well do those things which the cashier commonly does, and further give the countenance of his responsibility to acts within the scope of the apparent authority of the cashier.

Any act which has the approval of these two officers

has the approval of each; and if it be something which is incidental to banking as a business, and not an extraordinary act necessarily outside of the conduct of a bank, when approved by either of these officers, is to be taken as approved and authorized likewise by the board of directors.

We have already stated, possibly at too great length, the evidence of which the Court will take judicial notice, that banking is necessarily borrowing; that every form of borrowing is incidental to the business; that this has been recognized by legislatures ever since banks were incorporated; and that works on banking recognize the ability to make use of the various forms of borrowing as one of the ordinary resources of a bank.

It follows from this that requesting or negotiating a loan comes as much within the scope of the duties of the cashier of a bank or his superior officer as requesting a deposit. Ordinarily it is no more than agreeing to pay interest upon a deposit. And this was true in the case at bar; for under Rev. Stats., secs. 5191, 5195, a general credit to a Cincinnati bank by its reserve agent in New York is as much a part of the deposits of the Cincinnati bank as moneys actually paid over its own counter.

The size of the loan can not of itself determine the power of the officer to effect it. Magnitude, in its relations to business, is always a question of proportion; and the mere statement of figures can not of itself characterize a transaction as extraordinary and beyond the power of an officer ordinarily authorized to effect such transactions, unless the sum runs to an amount which no human experience can conceive as permissible. Within that limit evidence is required to show that the transaction is extraordinary. If this be shown, then, by that fact, notice is charged upon the lender to inquire as to what authority has been

given the cashier to do an extraordinary thing. But in the absence of evidence of that character the cashier is as much authorized to borrow a sum that seems large as one that seems small.

Magnitude being a question of proportion, the scale varies according to the circumstances. What would be a perfectly legitimate request for accommodation from a partner in a firm having a capital of $100,000 would be extraordinary coming from one in a firm having a capital of $10,000, and in the latter case might well put the lender to inquire as to authority. And so what would be a startling proposition coming from a small country bank would excite no comment when made by a bank of a large city. New York and London measure transactions by one scale; Cincinnati and St. Louis by another; Paducah and Kalamazoo by still another. So the number of digits necessary to express the sum loaned do not of themselves show whether that loan is large or small; that can be determined only by the apparent business demands of the person asking the loan.

Therefore the fact that the loan here was for $300,000 does not of itself show that the loan was large. The borrowing bank was not a small rural concern, but one in a city important enough to furnish reserve banks for other cities under Rev. Stat., section 5191, and advertising its capital as $1,000,000, and its loans and discounts at over $4,000,000 (Rec., p. 286). The request was made of its reserve agent; and the reason stated for the request was the desire to keep a large reserve (Rec., pp. 21–22). There is absolutely no evidence even tending to show that any person accustomed to the banking business would at that time have regarded this request as one for an extraordinary amount and suspicious in itself. And in the absence of

such evidence we submit that this Court has no power to draw any such inference.

The custom of banking, whereby cashiers have implied authority to borrow money for their banks, has been judicially recognized without proof in the courts of last resort in New York, Ohio, Pennsylvania, Missouri and Wisconsin:

Barnes v. *Ontario Bank*, 19 N. Y. 152.

Sturges v. *The Bank of Circleville*, 11 Ohio St. 153, 167.

First Nat. Bank of Allentown v. *Sullivan*, 11 W. N. C. 362.

Donald v. *The Lewis County Savings Bank*, 80 Mo. 165.

Rockwell v. *Elkhorn Bank*, 13 Wis. 653.

Ballston Spa Bank v. *The Marine Bank*, 16 Wis. 120, 134.

We do not stop now to quote from these cases, although we shall quote from some of them hereafter. They show conclusively how wide spread and of what long standing has been this custom, and that in 1887, when the transaction took place in the case at bar, no one conversant with the banking business would have dreamed of requiring a known bank officer to produce credentials to show his authority to borrow money upon behalf of his bank.

Not only is the existence of the power to borrow, as inherent in the office of the cashier and his superior officers, established by the course of reasoning just urged, and by the decisions just cited in which it has been directly recognized; it is affirmed also by decisions as to cognate acts. For where the authority of an agent is to be inferred from the powers usually exercised by such an agent, it is enough if the transaction in question involves precisely the same general powers, though applied to a new subject-matter. *Merchants' Bank* v. *State Bank*, 10 Wall. 604.

It will be remembered that the borrowing is not always done, as in this case, by a simple request and credit, or the

actual transfer of funds. The loan may be evidenced by a promissory note originally discounted by the lending bank, or by the latter bank rediscounting paper which has already been discounted by the borrowing bank. This appears in the testimony of the witnesses referred to *supra*, p. 71. As stated earlier in this argument, rediscounting is simply a form of borrowing; the bank obtaining the rediscount necessarily indorses the paper rediscounted, and thus pledges its own credit therefor. It stands with reference to the lending bank just in the same position that the original discounter stood with reference to it; and as the original discount was a loan by it, so the rediscount is a loan to it. So, all the authorities which sustain the power of executive officers of a bank *virtute officii* to rediscount paper, sustain also the power of those officers to borrow in any other manner that is usual in the banking business.

That it falls within the apparent scope of the duties of the cashier or other executive officers of a bank to raise money for its use by rediscounting, by selling paper with guaranty of payment, and in other ways, has often been judicially declared.

The germ of the idea lies in what was said by Mr. Justice Story, in 1825, in *Wild* v. *Bank of Passamaquoddy*, 3 Mason, 505, 506, viz.:

"The cashier of a bank is, *virtute officii*, generally intrusted with the notes, securities, and other funds of the bank, and is held out to the world by the bank as its general agent in the negotiation, management, and disposal of them. *Prima facie*, therefore, he must be deemed to have authority to transfer and indorse negotiable securities, held by the bank, for its use and in its behalf. No special authority for this purpose is necessary to be proved. If any bank chooses to depart from this general course of business, it is certainly at liberty so to do; but in such case, it is in-

cumbent on the bank to show that it has imposed such restriction, and that such restriction is known to those with whom it is in the habit of doing business. In the present case, the cashier has, as cashier, indorsed the bill in behalf of the bank, and this is *prima facie* evidence of authority, it being within the ordinary duties performed by such an officer. If he was restricted in his authority, it is for the defendants to show it. The proof is in their possession, and the plaintiff, who is a stranger to their regulations, can not be presumed to be conusant of it."

See also the cases cited under proposition IV, *infra*, and *West St. Louis Savings Bank* v. *Shawnee Bank*, 95 U. S. 555.

People's Bank v. *National Bank*, 101 U. S. 181.

Sturges & Co. v. *Bank of Circleville*, 11 Ohio St. 153.

Bank of the State v. *Wheeler*, 21 Ind. 90.

Houghton v. *First National Bank of Elkhorn*, 26 Wis. 663.

Bissel v. *First National Bank of Franklin*, 69 Pa. St. 415.

First Nat. Bank v. *Sullivan* (Sup. Ct. Pa.), 11 W. N. C. 362.

Crain v. *National Bank*, 114 Ill. 516.

City Bank of New Haven v. *Perkins*, 29 N. Y. 554, 569.

Merrill v. *Hurley*, 6 So. Dak. 592.

City National Bank v. *Hastings*, 46 Neb. 86.

In the case of *West St Louis Savings Bank* v. *Shawnee Bank*, 95 U. S. 557, this Court, in speaking of the powers of the cashier, say, through Mr. Chief-Justice Waite, on page 559:

"Ordinarily, the cashier, being the ostensible executive officer of a bank, is presumed to have, in the absence of positive restrictions, all the power necessary for such an officer in the transaction of the legitimate business of bank-

ing. Thus, he is generally understood to have authority to indorse the commercial paper of his bank and bind the bank by the indorsement. So, too, in the absence of restrictions, if he has secured a *bona fide* rediscount of the paper of the bank, his acts will be binding because he has implied power to transact such business."

In *People's Bank* v. *National Bank*, 101 U. S. 181, where the vice-president of the defendant bank had by guaranty of payment, without authority from its board of directors, induced the plaintiff bank to purchase certain negotiable notes made by a debtor of the defendant bank to his own order and indorsed in blank, the proceeds being turned over to the defendant bank, this Court, speaking by Mr. Justice Swayne, after quoting from Revised Statutes, section 5136, as to the powers of a national bank to discount and negotiate negotiable paper, say (p. 183):

"To hand over with an indorsement and guaranty is one of the commonest modes of transferring the securities named. Undoubtedly a bank might indorse, 'waiving demand and notice,' and would be bound accordingly. A guaranty is a less onerous and stringent contract than that created by such an indorsement. We see no reason to doubt that, under the circumstances of this case, it was competent for the defendant to give the guaranty here in question. It is to be presumed the vice-president had rightfully the power he assumed to exercise, and the defendant is estopped to deny it."

Sturges & Co. v. *The Bank of Circleville*, 11 Ohio St. 153, already referred to, page 66, *supra*, was very similar in its facts to the case last mentioned—the cashier of the defendant bank having sold to the plaintiffs a negotiable note with warranty that it was good, and the action being upon the warranty. The authority of the cashier to make the warranty being denied, the Court, speaking through Sutliff, J., said (p. 167):

"It is not claimed that the respective duties of the board of directors, president and cashier, in the exercise of the franchises of the bank, are prescribed by the charter. So far, therefore, as the limitation of the appropriate duties of the cashier depend upon his office, we can only have respect to the ordinary and well-understood duties of that officer in determining his powers. A cashier is defined to be one who has charge of money, or who superintends the books, payments and receipts of a bank or moneyed institution. His actual power and duties, like those of all other agents, may be more or less qualified, restricted or enlarged by the corporation, institution or party for whom he acts. But in this case, there being nothing to show any restriction or qualification of his powers in that regard, the duties of the cashier may reasonably be understood to extend to the buying and selling, and negotiating bills of exchange, checks and promissory notes, as well as to that of borrowing money, as the agent of the bank."

Thus far we have considered only evidence of which the Court must take judicial notice, that the usage of banking clothes both presidents and cashiers with authority to borrow money for their banks.

But the case does not stop here. Directors of banks are presumed to know not only those usages which are so well known that the courts notice them without proof, but those special and peculiar usages as to banking which prevail in the places where their bank does its ordinary business. They are presumed not only to know them but to adopt them, and to conduct their business according to them, except in so far, and as to those persons, to whom they have given notice to the contrary. This presumption, which is obligatory on persons who deal with the bank (*Bank of Washington* v. *Triplett*, 1 Peters, 25, 32–34; *Lincoln & Kennebeck Bank* v. *Page*, 9 Mass. 155), is equally obligatory upon the bank and all its officers. *Neiffer* v. *Bank of*

Knoxville, 1 Head, 162; *Crain* v. *National Bank*, 114 Ill. 516; *Merchants' Bank* v. *State Bank*, 10 Wall. 604, 641, 644.

The evidence is undisputed and conclusive that by the usage of banking, as practiced both in Cincinnati and New York, where a bank desired to borrow money the loan was always negotiated by one of its executive officers, without ever showing, or being called upon to show, proof of his authority so to do.

Every bank acted upon the assumption that such an act was within the scope of the officer's official duty, and needed no fortification by the production of either a special or general resolution or by-law passed by the board of directors.

We need not give again the names and qualifications of the witnessess as we have mentioned those *supra*, p. 71; but we desire to quote part of the testimony of some of them on this point.

Dumont Clarke, president of the American Exchange National Bank of New York, after saying that borrowing money was a very common occurrence in the banking business, prior to the decision of the *Western National Bank* case, said (Rec., p. 135):

"Q. 9. Who acted for the borrowing bank in such a case? A. At times the cashier, and at times the president, either one of the officers.

"Q. 10. Did the lending bank, prior to that decision, ever require proof of the authority of the officers of the borrowing bank in the shape of a resolution by the directors authorizing the loan? A. No, sir; we never required any thing like that."

A. B. Hepburn, president of the Third National Bank of New York, having first testified to the existence of that usage, said (Rec., p. 137):

"Q. 10. Who acted for the borrowing bank in such transactions? A. Either of the executive officers; cashier or president.

"Q. 11. How about the vice-president? A. Or vice-president or assistant cashier. Any of the executive officers.

"Q. 12. What proof, if any, did the lending bank require as to the authority of the officers of the borrowing bank to make application for the loan? A. Genuineness of the signature to the application, as well as the correspondence, and they protected themselves by passing the money to the credit of the borrowing bank upon the books of the lending bank, so that it could only be drawn out by the checks of the officers in the regular course of business.

"Q. 13. Prior to that decision, did the lending bank ever require the passage of resolutions by the board of directors of the borrowing bank directing the making of the loan and authorizing it? A. I never knew of such an instance. It was not a usual thing at all.

"Q. 14. Was or was not the borrowing of money one of the matters that fell within the ordinary scope of the duties of the cashier and vice-president of the bank? A. It was."

Edward Townsend, cashier of the Importers' and Traders' National Bank of New York, having first testified to the existence of the same usage, said (Rec., p. 149):

"Q. 5. Who acted for the borrowing bank whenever it desired to borrow money? A. Any official whose signature was authorized with us.

"Q. 6. And what officials was it customary to give authorization to for signature? A. Generally the president and cashier, and frequently the vice-president and assistant cashier, also.

"Q. 7. Did the lending bank prior to that decision ever require proof of authorization to make the loan in

the form of a resolution of the board of directors of the borrowing bank? A. Never to my knowledge."

George F. Baker, president of the First National Bank of New York, having testified to the same usage, said (Rec., p. 150):

"Q. 5. Who acted for the borrowing bank when a loan was to be made? A. Any of its officers.

"Q. 6. When you say any of its officers, whom do you class as officers? A. Generally the president or cashier, and occasionally a director.

"Q. 7. How about the vice-president? A. The vice-president; yes, sir.

"Q. 8. In such cases did the lending bank require the proof of authority of the officer of the borrowing bank making application for the loan in the form of a resolution of the board of directors authorizing the making of the loan? A. No, sir."

Frederick D. Tappan, president of the Gallatin National Bank of New York, having testified to the same usage said (Rec., p. 152):

"Q. 8. In the making of such loan who acted for the borrowing bank? A. Either the cashier or president.

"Q. 9. How about the vice-president? A. The vice-president, in the absence of the president. In some cases the vice-president is the more active man; not usually, but there have been cases where the vice-president has been the more active man of the two.

"Q. 10. And in such cases he would be the person naturally to act? A. Yes, sir.

"Q. 11. In making such loans did the loaning bank require proof of the authority of the officer of the borrowing bank making the application, by a resolution of the board of directors, prior to this decision of which I have spoken? A. I think not.

"Q. 12. When you say you think not, how positive is your information upon this point? A. That they never

have required a resolution of the board of directors of the borrowing bank."

W. S. Rowe, cashier of the First National Bank of Cincinnati, said (Rec., p. 186):

"Q. 9. Mr. Rowe, tell us whether or not, prior to the decision of the Supreme Court of the United States, in the case of *The Western National Bank* v. *Armstrong, receiver of the Fidelity National Bank*, in the spring of 1894, about a year ago, it was considered within the scope of the duties of the cashier of a bank to borrow money for his bank? A. Yes, it was.

"Q. 10. What, if any thing, was required by the lending bank, beyond the application of the cashier or one of his superior officers—the president or the vice-president of the bank? A. Our rediscounting for country banks, for the loaning of the money, was usually done by correspondence, and the letter would be signed by either the president, vice-president or cashier. If it was a rediscount we took their acceptable business paper, with their indorsement; if it was a direct loan we took the note of the bank, signed by one of the three officers I have named, with municipal bonds, or other good bonds as collateral, without any thing else.

"Q. 11. Was any resolution of the board of directors required? A. No, sir.

"Q. 12. Do you know whether that was usual in banking—in the banking business, prior to 1894? A. It was not, so far as my knowledge goes."

G. P. Griffith, vice-president of the Citizens National Bank of Cincinnati, having testified that borrowing money was a usual thing, said (Rec. p. 196):

"Q. 9. Mr. Griffith, please state whether or not, prior to that decision, it was a usual thing for the lending bank to require from the borrowing bank a resolution of the board of directors authorizing the loan. A. Never.

"Q. 10. State whether or not the borrowing of money for a bank, from another bank, was one of the duties incident to the office of cashier, president or vice-president, or either of them? A. Well, I don't think you put your question right—

"Q. 11. Well, just answer the question according to your knowledge of the facts, please? A. It is customary to make loans to correspondent banks when applied for either by the president, vice-president or cashier of said bank.

"Q. 12. Was proof ever demanded as to the authority of either of the officers you have named to make the loan? A. Not to my knowledge or memory."

J. D. Hearne, President of the Third National Bank of Cincinnati, having testified to the same practice, said (Rec., p. 200):

"Q. 4. State whether, prior to that decision, it was customary for the lending bank to require from the borrowing bank the passage of a resolution by its board of directors, authorizing the loan? A. It was not.

"Q. 5. Was the passage of such a resolution ever required by the lending bank, so far as your knowledge goes? A. It never was, so far as my knowledge and experience goes.

"Q. 6. Mr. Hearne, what officers acted for the borrowing bank in such transactions? A. The managing officers; either the president, or the cashier, as the case might be.

"Q. 7. How about the vice-president? A. The vice-president would act if he were an active officer.

"Q. 8. What proof, if any, did the lending bank require of the authority of either, or any, of these officers to make the loan, more than the knowledge of the fact that they held their respective positions? A. Did not require any.

"Q. 9. Mr. Hearne, did it, or not, fall within the scope of the duties of the cashier, president, or vice-presi-

dent to borrow money on behalf of his bank from another bank? A. It did. It was so regarded."

Evidence to like effect was given by George G. Williams and William J. Quinlan, the president and cashier of the Chemical National Bank (Rec., p, 130, Q. 9, XQQ. 1–5: Rec., pp. 123, 124, QQ. 17–21, XQQ. 3–7), and also by M. M. White and H. C. Yergason, presidents of the Fourth and Merchants' National Bank of Cincinnati (Rec., pp. 166–168, QQ. 7–17, and p. 193, QQ. 5–10.

Abdication. As we have said in the statement of the case, the directors of the Fidelity Bank practically intrusted the whole management to Harper. Evidence of the strongest nature to this effect is furnished by the minutes of the board of directors, Rec., pp. 247–259, from which it appears that the only business ever done by the directors was the election of officers and fixing of their salaries, the enactment of by-laws, the declaration of two dividends, the ratification of the action of the officers in purchasing government bonds to be deposited as security for government deposits, and the taking steps in an improper way toward the increase of the capital stock. Absolutely no control or supervision was reserved or exercised over the business of the bank, not even in the matter of discounts. At the last meeting held by the board, Mr. Kineon, who had frequently theretofore endeavored to induce Mr. Swift, the president of the bank, to bring the discounts before the board, offered a resolution looking to the examination of the discounted paper by a committee, Rec., p. 259; and his showing this insubordination resulted in his retirement from the board. The story will be found in his evidence, pages 178–184. He was a director of the bank from the beginning until May 10, 1887, when the events took place

to which we have just referred. In his testimony he says (Rec., p. 178):

"Q. 6. Up to the time when you quit, Mr. Kineon, who was the active officer managing the bank? A. Mr. Harper—E. L. Harper.

"Q. 7. What was his official position? A. He was vice-president.

"Q. 8. What did he do with reference to the bank? A. He did every thing; he ran the whole bank.

"Q. 9. Did the directors know that he was running the whole bank? A. Well, I guess they were aware that he had charge. I don't know why they didn't."

Mr. Franklin Alter was a director at the organization of the bank and remained such until the annual election in January, 1887. He testified as follows (Rec., p. 172):

"Q. 6. Mr. Alter, state, during that time, who had the practical control and management of the Fidelity National Bank? A. E. L. Harper.

"Q. 7. Was that known to all of the board of directors? A. Yes.

"Q. 8. Was it with their consent and approval that Harper managed the bank! A. Yes.

"Q. 9. Were the directors advised of the transactions of the bank, in the way of loans and discounts, and cash items, and other things of that kind? A. I don't think they ever were, in detail, unless they went outside and got their information from other sources.

"Q. 10. They practically entrusted the whole management of the bank to Harper? A. Yes.

"Q. 11. What was E. L. Harper's position in the Fidelity? A. He was vice-president.

In the history of the bank Mr. Alter showed a tendency to do his duties in more than a perfunctory manner. He wished to investigate the fitness of Harper, Baldwin, and the assistant cashier, Hopkins, for their respective

offices; he wished also to investigate as to the condition of the bank. He was rebuffed, and naturally ceased his efforts, and was dropped from the board at the first opportunity. The story will be found in his testimony (Rec., pp. 172–176).

The testimony given by these two members of the board of directors is confirmed by that given by C. A. Hinsch, one of the receiving tellers (Rec., pp. 176–178), A. P. Gahr, another member of the board and confidential secretary of Harper (Rec., pp. 202–204), and J. H. Watters, general bookkeeper (Rec., pp. 235, 236, questions 52–63); nor is it anywhere contradicted by evidence offered by the appellant. The only witnesses called by him who alluded to this subject were J. H. Matthews and Henry Pogue. Mr. Matthews was a brother-in-law of Harper and a member the board of directors. He was elected upon the first board in 1886, but immediately resigned (Rec., p. 247). He was again elected in January, 1887, taking Mr. Alter's place, and served during the residue of the existence of the bank. He was not examined in chief as to the conduct of the board (Rec., p. 237), but on cross-examination he confirms the testimony of the other witnesses; for the only instance which he can recall when the management of the bank was discussed in the board was what occurred at the meeting when Mr. Kineon resigned (Rec., p. 239; QQ. 16–21, and p. 242, Q. 48), and his testimony shows that Mr. Harper was not merely the dominant spirit, but the actual controller of the bank.

Mr. Pogue was elected a director to succeed Matthews at the formation of the bank, and continued to the end. All that he said on examination in chief upon this question is (Rec., p. 243):

"Q. 4. Were you an active director, Mr. Pogue, dur-

ing the whole time? A. Well, yes; I suppose all the directors are supposed to be active; we all took an active interest in the affairs of the bank."

On cross-examination he states that there was a loan committee composed of the active officers of the bank (Rec., p. 244, XQ. 4, referring, we suppose, to by-law 17, Rec., p. 252). Being asked wherein the directors displayed their activity in managing the bank, he said that the directors did not manage it, but the officers did; that the directors met at stated times and had reports from the officers which were spread upon the minutes; that the only instance he can recall in which the directors of their own motion sought for any information was again at that meeting when Kineon's request for information brought about his resignation; that with that one exception the directors left the management of the bank to the board of officers; that Harper was the active managing man on that board and of the bank; and that the directors never looked into the cash account (Rec., pp. 244, 245, XQQ. 5–17). The minutes show that reports like those Mr. Pogue speaks of were not made. The only reports there appearing are one of the business done on the day the bank opened, and another of the resources and liabilities on December 23, 1886 (Rec., pp. 248–249, 254–255).

The subordinates in the bank knew of the entries which Harper caused to be made, transferring funds in the cases of the loans by the Chemical Bank and the First National Bank of New York; for without their assistance those entries could not have been made. They must also have known of the abstraction of the collaterals which went to secure the loans which Harper made in New York in the name of the Fidelity Bank at those times; for it is inconceivable that assets of the bank of so large an amount should

have been abstracted from its vaults without their knowledge. The inquiry suggested by Mr. Kineon, and which the directors declined to pursue until Kineon was retired from the board, would have disclosed that abstraction and the transactions connected with it if faithfully pursued.

The bill of complaint which the receiver filed against the directors shows discounts in many cases far in excess of the limitations imposed by Rev. Stat., section 5200. These transactions must have become known to the directors if they had been willing to give even the most perfunctory attention to the performance of their duties.

The 22d by-law of the bank prohibited in terms the carrying of cash items as cash (Rec., p. 252); yet Harper was permitted to direct this to be done (Rec., p. 177), and the extent to which it was done appears in that bill; and some of the directors were also favored in this way (Rec., p. 212). In the final throes Harper, without authority from the directors sent away over $1,000,000 of the bills receivable of the bank to secure a further loan from the Chemical Bank. This transaction was never questioned either by the directors or by the receiver. The collections from those securities are shown in Watters Exhibits 8 and 9 which have not been printed in full (Rec., pp. 115, 116). But the New York decree (Rec. p. 26) shows that these collections left, after satisfying the June loan, a balance of $271,808.34 in the hands of the Chemical Bank; and Armstrong Exhibits Nos. 7 and 8 show that there were still uncollected other securities amounting to many thousands of dollars.

The evidence, therefore, fully warrants the assertion that the board of directors intrusted the bank to Harper, and practically gave him *carte blanche* to manage it as he saw fit. In no way did they attempt to watch over, direct, or control his actions. In 1887 a majority of them were

his nominees, and held their positions at his will, viz: Baldwin, Hopkins, Gahr and Matthews, besides himself. The stock in the name of these four men was really held by Harper (Rec., p. 173, QQ. 18, 19; p. 202, Q. 5; p. 238, QQ. 6 and 7). The stock ledger accounts of Harper, Matthews and Gahr are given on record pages 302–305; and an analysis of these will show that in February, 1887, Harper, in their names and in his own, was the registered owner of over $390,000 of the capital stock of the bank, its whole capital being only $1,000,000. Because of his overwhelming personal interest in its affairs, and because of their confidence in his ability and trust in his integrity, the directors of the bank practically abdicated their positions and suffered him to be dictator. They have paid out of their own pockets for this confidence and misplaced trust, as is shown by the bill of complaint filed against them by Armstrong and the decree thereon (Rec., pp. 271–289, 291 and 294). But this is not the only result which follows; for it is well settled that such conduct by a board of directors is a delegation to the dictator thus created by them of every power which he has in fact exercised, and which they might in law delegate.

Martin v. *Webb*, 110 U. S. 7, 14.

Glidden & Joy Varnish Co. v. *Interstate National Bank*, 32 U. S. Appeals, 664; 69 Fed. 912.

Davenport v. *Stone*, 104 Mich. 521.

Wing v. *Commercial and Savings Bank*, 103 Mich. 565.

First National Bank of Kalamazoo v. *Stone*, 106 Mich. 367.

City Bank of New Haven v. *Perkins*, 4 Bosworth, 420.

Martin v. *Webb*, 110 U. S. 7, is pertinent to many aspects of the case at bar. The question involved was

whether a bank was estopped to deny the authority of its cashier to cancel certain notes held by it, and the deed of trust securing them, without payment. The evidence showed that the cashier had been given practical control of the bank, as Harper was in the case at bar. And thereupon the Court held the bank estopped by his act, although that act was one which confessedly did not fall within the scope of his apparent authority. The Court said, speaking through Mr. Justice Harlan, and referring to the powers of the cashier (page 14) :

"Ordinarily, he has no power to discharge a debtor without payment, nor to surrender the assets or securities of the bank. And, strictly speaking, he may not, in the absence of authority conferred by the directors, cancel its deeds of trust given as security for money loaned—certainly not, unless the debt secured is paid. As the executive officer of the bank, he transacts its business under the orders and supervision of the board of directors. He is their arm in the management of its financial operations. While these propositions are recognized in the adjudged cases as sound, it is clear that a banking corporation may be represented by its cashier—at least where its charter does not otherwise provide—in transactions outside of his ordinary duties, without his authority to do so being in writing, or appearing upon the record of the proceedings of the directors. His authority may be by parol and collected from circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. When, during a series of years, or in numerous business transactions, he has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corpora-

tion, that he has acted in conformity with instructions received from those who have the right to control its operations. Directors can not, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

The judgment in *City Bank* v. *Perkins*, 4 Bosw. 420, was affirmed in the Court of Appeals, 29 N. Y. 554. But the opinion in the Court below has been frequently cited and its reasoning approved by other Courts, and for that reason and because of the force with which the opinion is stated, although it is that of an inferior tribunal, it is worthy of the serious consideration of this Court. The question involved was as to the liability of a bank for money borrowed in its name by its defaulting cashier, McMillen; and on page 441 the Court said:

"McMillen, as such cashier, had authority to borrow money for the Bank of Akron. To what extent he borrowed for the bank, the evidence does not disclose. He had, practically, the whole management of the business of that bank. Its board of directors met semi-annually, but according to the evidence before us did not, at those meetings, or at other times, inquire as to the details of its business, the mode of its operations, or into the manner in which the cashier was prosecuting its business.

"Under such circumstances, we think the plaintiffs are entitled to have this controversy determined upon the prin-

ciple, that as between them and the Bank of Akron, the cashier of the latter was fully authorized to borrow money for it, and in its name, and that any loan made by the plaintiffs, in good faith, on an application of the cashier of the Akron Bank, as such cashier, to borrow for it, is a loan to that bank, and that such bank is primarily liable for such loan, as the party borrowing."

And again on page 444 it was said:

"There is no pretense that the nature and extent of the authority of the cashier of the Bank of Akron have ever been defined by any direct act of the corporation. On the contrary, he has been permitted, as being within the scope and limits of his authority, to exercise a large range of powers, and his own judgment as to the transactions which he deemed to be for the interest of the bank, and the terms on which he should contract, in making engagements as its agent, which the bank might lawfully make.

"Such exclusive control and management for so long a period by the cashier, with the assent of the directors, amounts to an authority to him to make contracts, in relation to its business which the bank might lawfully make, and will conclude the bank as between it and a party who has dealt directly with it through such cashier, and who, on the faith of his having authority to make such a contract, has loaned money to, or paid it for such bank."

Not only the case just cited, but all others cited in the same connection, were cases as to the responsibility of banks for actions of their officers without explicit authority from their boards of directors, and they have been selected for this reason. Had we extended the citations so as to cover other classes of corporations, the list might have been extended almost indefinitely.

The case of *Wing* v. *The Commercial and Savings Bank*, 103 Mich. 565, was as to the authority of Fuller, the cashier of the defendant bank, to release parties liable on commer-

cial paper held by it. The scope of action left open to Fuller resembles greatly that permitted Harper; for the Court say, page 569:

"It is not claimed that any of the other directors or officers of the defendant bank had any actual knowledge of these transactions, or took any part in them. Fuller and his relatives and personal friends, all of them non-residents of Ludington [the place where the bank was located], owned a majority of the stock of the defendant bank; and Fuller, as he often boasted, was the sole manager, and could do any thing he pleased in relation to the management of the bank. He openly asserted this on different occasions, and his course of conduct lent all possible color to the claim. He advanced the money of the bank to build a club house in the city of Ludington. He took stock in manufacturing companies, and did other extraordinary things for the cashier of a bank to do, without any protest on the part of the resident directors of the bank. The directorate was made up of men totally unacquainted with banking, men engrossed in other affairs, and who had neither time nor inclination to look after the affairs of the bank. They voluntarily left all matters to the discretion of Fuller; seldom held meetings of the directors; and it is uncertain, under the evidence, whether a meeting was held between the 1st of April and the 15th of August of the year 1892. . . . It appears from all the testimony that the boast of Fuller that he controlled the bank was not an empty or idle one by any means. It does not appear that the outside stockholders took their stock on the express condition that Fuller should have absolute control, or that there was any express agreement to that effect. It does not appear whether the directors had actually voted to confer unusual powers upon Fuller, but it does appear that he claimed and exercised them without let or hindrance on all occasions. He was by sufferance, if by no other authority, something more than a cashier; he was the manager of the bank."

The rule of law applicable to actions of an agent acting under the circumstances just detailed is expressed by the Court on page 576, as follows:

"The rule undoubtedly is that usually the authority of a cashier of a bank is a limited authority, and that a party seeking to show a release by the cashier from liability upon commercial paper held by the bank, except in the ordinary course, must show that the cashier had authority from the directorate, or that the act had been ratified or acquiesced in by the bank. That authority, however, may be shown expressly or by necessary implication, or it may be established by the particular usage, practice, or mode of doing business by the bank. If a cashier be allowed to exercise general authority in respect to the business of the bank for a considerable time,—in other words, if he is held out to the public as having authority in the premises,—the bank is bound by his acts, as in case of an agent of any other corporation, by whatever name he may be designated, in the same manner as if they were expressly granted. The directorate of a bank can not be permitted to neglect its duties, abandon the management to the cashier, permit him openly and notoriously and without rebuke to deal with the public as having authority and then escape responsibility."

IV. THE CHEMICAL NATIONAL BANK WAS NOT REQUIRED TO SEE THAT POWER TO BORROW THIS MONEY HAD BEEN DELEGATED, BUT MIGHT PRESUME THE LOAN WAS AUTHORIZED.

This is but a concrete statement of the abstract propositions heretofore discussed; their application to the facts of this case. Those facts, briefly restated, are that it is a usual thing for one bank to borrow money from another; that the form of the loan is by rediscount of paper already held by the borrowing bank, or by original discount of a note made by it, or for its accommodation and indorsed by it,

or upon its certificate of deposit to the order of one of its officers, or upon its simple request in writing—collateral security being usually required when the loan was not a rediscount of existing paper. The request for the loan was always made by one of the executive officers of the bank, president or cashier, or, if active officers, vice-president or assistant cashier. No proof of authorization of the loan by the directors, or of general or special delegation of authority to make it, was ever required, appointment to the office being considered as giving credence and the right, as well as the duty, to speak for the bank.

All these features are present in this case. The two banks concerned were correspondents, the lending bank being a New York depository and reserve agent of the borrowing bank—the most natural source to be applied to for a loan; the request came from the vice-president of the Fidelity Bank; it carried with it the usual evidences of its genuineness, viz., a certificate of deposit issued by the Fidelity Bank, in favor of the officer making the request, and bills receivable as collateral; and it was fortified and shown to be made with the approval of the cashier by his signature to this certificate of deposit. Every thing, therefore, was regular upon its face, nor was there any thing to excite suspicion. And it will be remembered that this was done, not by any usage peculiar to these two banks, but in accordance with the usage of all banks. Such is the testimony for the appellee, and, as observed by the Court below (Rec., p. 345):

"The failure of the defendant to call witnesses to contradict the evidence of the complainant upon the question of usage, lends most significant support to the view that it was well known and generally acquiesced in."

To the same purport is the language of Judge Sage in the Circuit Court (Rec., p. 309):

"All this testimony is uncontroverted, and it is quite significant that although Receiver Armstrong was himself an old and experienced banker, it was not until after the decision of *Western National Bank* v. *Armstrong* that the point was made that the negotiation of the loan upon which this suit is based was outside the ordinary course of business in banking, and not within the authority of the line of the duties of the vice-president of the Fidelity Bank."

It is now contended, however, that the banks of the country did not know how to conduct their business; and that they could not safely make a loan to another bank without having evidence that it was authorized by the directors of that bank. The cashier is the executive officer of a bank, and the person through whom decisions of its board of directors are ordinarily communicated to the outside world. Hitherto they had been trusting to his assurance that the loan was authorized, given it is true by implication, but still necessarily given whenever the request came through him. Of what avail, therefore, to ask any further assurance when the request for the loan comes through the cashier. If he gave a written statement, that might be false. Even if a certified copy of resolutions passed by the directors were demanded, yet this certificate would be made by the cashier, and might again be false—indeed, would be false if the cashier were perpetrating a fraud. Suppose such a false certificate were given, would the bank nevertheless be liable? This might be doubted, for the agency of the cashier is to certify what appears upon the minutes, and not as to what does not there appear. *Pollard* v. *Vinton*, 105 U. S. 7. And if it be said that nevertheless the scope of his authority is to give certificates, so it may be answered the scope of the authority

of the master of a vessel is to give bills of lading; and that in each case the authority is limited to certifying to the truth, and does not extend to creating a liability by certifying a falsehood. And furthermore, as the cashier is the executive officer of the bank, it falls within the scope of his authority to conduct the business of the bank as authorized by the board of directors just as much as, as secretary of that board, it falls within his duty to give certificates as to their proceedings. Introducing this novelty of requiring a certified copy of a resolution by the board of directors does not serve to protect banks against frauds by their cashiers, for the cashier who would borrow without authority would not hesitate to forge proof of the authority; and the claim of the lending bank based upon such forgery can be sustained only by a process of reasoning which, in its full development, would sustain its claim upon the representation of the cashier without the forgery accompanying it. The only safe course for a lending bank to take, if this rule as to the necessity of an express delegation of authority shall prevail, will be to have a delegate present at the meeting of the board of directors of the borrowing bank, able to testify thereafter as to what then occurred.

What was said in the case of the *Western National Bank* v. *Armstrong*, 152 U. S. 346, with reference to the necessity of special delegation of authority and proof thereof, was said without the information now laid before the Court as to the nature of the banking business, and the manner in which it is conducted. To apply the rule there laid down to the different state of facts shown by this record, would be not only to overthrow a long line of decisions as to the banking business, but to shake to their foundation principles heretofore considered settled beyond debate in the law of corporations and that of agency. In the leading case in England of *Royal British Bank* v. *Turquand*, 6 E. &

B. 327 (Exchequer Chamber; reported below in 5 E. & B. 248), the question was raised as to the indebtedness of a corporation upon a loan made by its board of directors, whose authority to borrow depended upon the passage of a resolution at a general meeting of the company. The Exchequer Chamber, through Jervis, C. J., said, p. 332:

"We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have the right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done."

It will be remembered that the deed of settlement of an English corporation is equivalent to the charter of an American corporation—an instrument filed in a public office so as to be accessible to the world at large. The information given there by the statute and deed of settlement as to the powers of a corporation and the limitations thereon, is that which is given with reference to a national bank by the statutes of the United States, and the articles of association which are filed with the Comptroller of the Currency. But as these articles are required, and can be expected, to contain only the matters specified in Revised Statutes, section 5134, really the only source of information as to powers and limitations to be examined by one dealing with a national bank is the statute book. The effect of the decision just cited is that where the directors of a bank are exercising powers conferred by statute or charter only upon condition of previous authorization by the body

of stockholders, one dealing with the directors may rightfully assume that the stockholders have given the necessary authorization; he is not required to demand an inspection of the minutes of the stockholders' meetings, or a certified copy of their action. It comes within the apparent scope of authority of the directors to borrow money; if the loan effected by them is beyond the actual limit of their authority, the loss must fall upon those who put them in office and enabled them to deceive the outside world. The rule thus applied to the actions of the directors is equally applicable to the actions of all other officers of the corporation. In short, if borrowing money be within the power of the corporation, and if the officer effecting a loan be the one through whom, in the proper course of business, a loan should be negotiated, then the lender need not seek proof of special authorization. It is only an application of the general principle in the law of agency, that knowledge of limitations upon the powers of a general agent must be forced upon, and not sought by, one who deals with him.

So in the *Colonial Bank of Australia* v. *Willian*, L. R., 5 P. C. 417, it was held (*italics* ours):

"Where a public company has been incorporated by virtue of a statute which prescribed certain rules for the constitutions of such companies, and for regulating their proceedings; it will be assumed *in judging of the transactions between the company and other parties, that the requirements of the statute have been complied with.*"

To the same effect are *Agar* v. *The Athenæum Life Association Society*, 3 C. B., N. S. 725, and *Prince of Wales Life & Ed. S. Co.* v. *Harding*, E. B. & E. 183.

The latest English case upon the subject is *Biggerstaff* v. *Rowatt's Wharf, Limited*, and *Howard* v. *Same*, [1896]

2 Ch. 93. The decision was by Lords Justice Lindley, Lopes and Kay in the Court of Appeal, and its importance and applicability to the case at bar justify us in stating it somewhat in detail. The defendant company was a corporation conducting a wharf. Its articles authorized the directors to appoint a managing director, and to confer upon him such of the powers of the board as they saw fit, other than the drawing, accepting or indorsing bills of exchange or promissory notes. Mr. Davy had been recognized and was acting as managing director, but there was nothing upon the directors' minute book to show either his appointment or what powers were conferred upon him. At the time of the transactions in question the board consisted of three members. On October 20, 1894, Harvey, Brand & Company discovered that the defendant company had misappropriated sundry barrels of which it was warehouseman. On October 22, 1894, a meeting occurred between Harvey, Brand & Co. and the three directors of the defendant, at which the former threatened criminal proceedings, and demanded the transfer to them of sundry securities held by the company. The meeting was postponed to the next day, when one of the directors was absent; and representation being made that the company had no money to pay wages, and must close the wharf unless they could get an advance, Harvey, Brand & Co., having interests which would suffer if the wharf were closed, agreed to advance the money for wages, upon getting security for the advance and for the moneys due them on the prior transactions. The managing director then gave them the security desired. On October 30, 1894, the defendant company went into the hands of a receiver; and at that time Harvey, Brand & Co. were indebted to it for storage. The cause is reported upon their claim to set off the moneys due them for the advance and the preceding misappropriation against the claim

for storage, and to be paid moneys which had been collected by the receiver on claims hypothecated to them. Upon this subject the members of the Court spoke as follows:

Lindley, L. J. (p. 102): "It is said that the company is not bound by those orders [the assignments to Harvey, Brand & Co.] because Mr. Davy had no authority to give them. Now, what is the law as to this point? What must persons look to when they deal with directors? They must see whether, according to the constitution of the company, the directors could have the powers which they are purporting to exercise. Here the articles enabled the directors to give to the managing director all the powers of the directors, except as to drawing, accepting, or indorsing bills of exchange and promissory notes. The persons dealing with him must look to the articles, and see that the managing director might have power to do what he purports to do, and that is enough for a person dealing with him *bona fide*. It is settled by a long string of authorities that where directors give a security which according to the articles they might have power to give, the person taking it is entitled to assume that they had the power. The hypothecations, therefore, are in my opinion valid."

Lopes, L. J., p. 103, after discussing some other questions, says:

"The question as to the hypothecation of debts is quite distinct. It is said that the managing director had no power to hypothecate them. There is no doubt that Mr. Davy was managing director, and acted as such, and, according to the articles the directors could have given him the power which he purported to exercise. There is an absence of evidence that they have done so; but is that enough to make his acts void? In Lindley on Companies, 5th ed., p. 159, the law is thus laid down: 'Upon principle, therefore, where persons are in fact employed by di-

rectors to transact business for a company the authority of those persons to bind a company within the scope of their employment can not be denied by the company, unless (1) their employment was altogether beyond the powers of the directors; or unless (2) the persons employed have been appointed irregularly, and those who dealt with them had notice of the irregularity. Where the power to appoint an agent for a given purpose exists, irregularity in its exercise is immaterial to a person dealing with the agent *bona fide* and without notice of the irregularity in his appointment. The following cases are important on this point. In *Smith* v. *Hull Glass Co.*, 8 C. B. 668, 11 C. B. 897, it was held that a company registered under 7 and 8 Vict., c. 110, was liable to pay for goods ordered by persons in its employ, and that it was not necessary for the plaintiff to prove that those persons were authorized by the directors to order the goods in question. Maule J. went further than this, and his judgment is an authority for the broad proposition that a company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act for the company, provided such persons act within the limits of their apparent authority; and that strangers dealing *bona fide* with such persons, have a right to assume that they have been duly appointed. This view is in accordance with later authorities.'

"Every word of that applies here. It can not be said but that Mr. Davy was acting within the limits of his apparent authority, or that Harvey, Brand & Co. were not acting *bona fide*, or that they had not a right to assume that Mr. Davy was duly appointed."

Kay, L. J., said, page 106: "Whether Mr. Davy had been formally appointed managing director does not signify; he acted and was recognized as such. By the articles the directors were authorized to delegate to him all their powers except the drawing, indorsing, and accepting bills of exchange and promissory notes. Mr. Davy, therefore, did nothing *ultra vires* of a managing director; and it would be extraordinary if a person dealing *bona fide* with the manag-

ing director of the company were bound to inquire whether the powers which the articles authorized the directors to give him had been formally delegated to him. There is a long string of cases shewing that a person so dealing with an officer of a company has a right to presume that all has been done regularly."

The principles underlying the decision just quoted have been repeatedly affirmed by this Court. Upon them rest the long line of decisions as to the effect of recitals in city and county bonds, which are so familiar that it will be necessary only to refer to the subject generally, and specifically to the case of *Moran* v. *Commissioners of Miami County*, 2 Black, 722, where (page 724) the opinion in *Royal British Bank* v. *Turquand*, 6 E. & B. 327, was quoted at length and approved. Upon this reasoning rests the decision in *Merchants' Bank* v. *State Bank*, 10 Wallace, 604, where the Court, speaking through Mr. Justice Swayne, in words which, with reference to the credit which may rightfully be given to the acts and declarations of cashiers and vice-presidents of banks, are fully applicable to the case at bar, said (p. 644) :

"Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists.

"If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them."

"The principle has become axiomatic in the law of corporations, and by no tribunal has it been applied with more firmness and vigor than by this Court.

"Estoppel *in pais* presupposes an error or a fault and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune shall not himself escape the consequences and cast the burden upon another. Smith was the cashier of the State Bank. As such he approached the Merchants' Bank. The bank did not approach him. Upon the faith of his acts and declarations it parted with its property. The misfortune occurred through him, and as the case appears in the record, upon the plainest principles of justice, the loss should fall upon the defendant. The ethics and the law of the case alike require this result.

"Those who created the trust, appointed the trustee and clothed him with the powers that enabled him to mislead, if there were any misleading, ought to suffer rather than the other party.

"Smith, by his conduct, if not by his declarations, avowed his authority to buy the certificates and gold in question from the Merchants' Bank, and the bank, under the circumstances, had a right to believe him."

The case of *Barnes* v. *Ontario Bank*, 19 N. Y. 152, is of acknowledged authority, and was cited with approval in *Merchants' Bank* v. *State Bank*, 10 Wallace, 650. There the cashier of the defendant bank, without the authority or knowledge of its board of directors or other officers, had procured the discount of its certificate of deposit issued without any deposit having, in fact, been made. The proceeds of the discount were placed to its credit with its New York correspondent, but no entry of any kind relating to the transaction appeared upon the books of the defendant bank. The Court held the bank liable upon the certificate, and in the principal opinion it was said (p. 156):

"The first questions presented are, whether the bank had power to borrow the money, and whether the cashier was a proper agent to execute that power without any special delegation of authority thus to act. That the power

to borrow existed, was determined by this Court, upon the fullest examination, in the case of *Curtis* v. *Leavitt*, 15 N. Y. 9. That the cashier, in virtue of his general employment, could exercise the power, was not denied upon the argument, and the proposition does not admit of a reasonable doubt."

The counsel who argued the case were Francis Kernan for the bank, and Nicholas Hill for the certificate holder—two of the most prominent lawyers of that day in the State of New York. The principle there decided was again affirmed by that Court in *Coats* v. *Donnell*, 94 N. Y. 168, where it was said (page 176) :

"The cashier of a bank is its executive officer, and it is well settled that as incident to his office he has authority, implied from his official designation as cashier, to borrow money for, and to bind the bank for its repayment, and the assumption of such authority by the cashier will conclude the bank as against third persons who have no notice of his want of authority in the particular transaction, and deal with him upon the basis of its existence."

In *Donnell* v. *The Lewis County Savings Bank*, 80 Mo. 165, the plaintiffs were the same New York banking firm as in the previous case, and were again attempting to sustain a loan which they had made to a Western bank upon an obligation executed in its name by one of its officers without authority expressly delegated by its board of directors, viz., a note signed by the cashier individually, payable to the order of the bank and indorsed by the bank through its president, which the plaintiffs had discounted, knowing it to be what bankers call "made paper," that is, paper without real consideration as between the parties, and made up merely to evidence the loan. The authority of the defendant bank to borrow money, and that of its officers to bind it upon such paper, were challenged and

denied by the Court below. This judgment was reversed, and the Court sustained the authority of any corporation, having general banking powers, to borrow, and also the apparent scope of the authority of the cashier to execute such power, and held that one dealing with him need not prove either special delegation or subsequent ratification. The opinion merely states the propositions with the conclusions reached, and refers for a fuller discussion to the case of *Ringling* v. *Kohn*, 6 Mo. App. 332, where similar questions were presented, saying (p. 171) :

"These positions are well supported by the numerous authorities cited and relied on by the Court of Appeals in its well-considered opinion in said case, and we think state the law correctly, when applied to the facts in this case, as well as to that."

The facts in the latter case were in brief as follows : The cashier of the People's Savings Institution, a corporation having general banking powers, borrowed from Kohn money in its name upon its demand note signed by him as cashier, pledging as security government bonds belonging to Ringling which the bank held on special deposit ; the cashier then absconded, being a defaulter in an amount much larger than the loan. The suit was by Ringling against the pledgee to recover his bonds. On the first trial Ringling recovered judgment, which was reversed upon grounds not material to the present discussion, 4 Mo. App. 59. On the second trial Ringling again recovered judgment, the Court below holding that the act of the cashier in borrowing the money did not bind the bank without proof of special delegation or subsequent ratification. In reviewing this judgment the Court of Appeals, after affirming the power of the bank to borrow money as being "a necessary and inherent privilege, inseparable from the exercise of its banking

functions," and referring with approval to the decisions in *City Bank* v. *Perkins*, 4 Bosworth, 420, and *Barnes* v. *Ontario Bank*, 19 N. Y. 56, cited above, sustains the conclusions there reached, and sums up the matter in the following words:

"We find no judicial authority for the proposition that when a cashier borrows for his bank, the lender will be imperiled unless a special power has been given."

The opinion of the Supreme Court of Pennsylvania in the case of *First National Bank* v. *Sullivan*, 11 Weekly Notes of Cases, 362, is so terse and so much to the point that we quote it in full:

"We have no doubt of the power of national banks to borrow money by means of negotiable paper, made or indorsed for their accommodation, and that they are bound by the contract of their presidents or cashiers to indemnify the person who may have accommodated them with his credit. It is a usual banking operation, and unless expressly prohibited, would be necessarily implied in every bank charter."

In *Farmers' National Bank* v. *Sutton Manufacturing Co.*, 6 U. S. App. 312, the Court (Mr. Justice Brown and Circuit Judge Taft), in speaking of the question whether the Manufacturing Co. could avoid its acceptance in the hands of a *bona fide* purchaser for value before maturity on the ground that it was *ultra vires*, said (pp. 332–3):

"If the extrinsic fact upon which depends the lawful character of the act is one peculiarly within the knowledge of the general agent of the corporation by whom the act is done, the act itself is an implied representation that the necessary fact exists, the truth of which the corporation is estopped from denying against any person who in dealing with the corporation has parted with value on the faith of

it. The principle has been frequently applied in cases of commercial paper issued in the name of a corporation by its officers having general authority to issue such paper. A leading case is that of *Stoney* v. *American Life Insurance Company*, 11 Paige, 635. Chancellor Walworth there decided that a negotiable security of a corporation, which upon its face appeared to have been duly issued by the corporation and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof without notice, although such security was in fact issued for a purpose and at a place not authorized by the charter of the Company, and in violation of the laws of the state where it was actually issued.—See, also, to the same effect, *Farmers' & Mechanics' Bank of Kent County, Maryland*, v. *Butchers' & Drovers' Bank*, 16 N. Y. 125; *Bissell* v. *Michigan Southern and Northern Indiana Railroad Companies*, 22 N. Y. 258, 289; *The Mechanics' Banking Association* v. *New York & Saugerties White Lead Company*, 35 N. Y. 505; *National Bank of Republic* v. *Young*, 41 N. J. Eq. 531; *Wright* v. *The Pipe Line Co.*, 101 Pa. St. 204; *The Hackensack Water Company, Reorganized*, v. *DeKay*, 36 N. J. Eq. 548; *The Credit Company, Limited*, v. *The Howe Machine Co.*, 54 Conn. 357; *Gelpcke* v. *The City of Dubuque*, 1 Wall. 175–203; *The Genesee County Savings Bank* v. *Michigan Barge Co.*, 52 Mich. 438; *Bird* v. *Daggett*, 97 Mass. 494."

In connection with the last of these cases see *Monument Bank* v. *Globe Works*, 101 Mass. 57.

Pertinent observations with reference to the matter under discussion are found also in the opinion of the Court of Errors and Appeals of New Jersey in *The Hackensack Water Company, Reorganized*, v. *DeKay*, 36 N. J. Eq. 548, one of the cases mentioned in the list just quoted. Speaking with reference to the obligations of a corporation, the Court say (p. 563, *italics* ours):

"Persons taking securities of this character are chargeable with the knowledge of the power to make them as con-

ferred by the Charter. If the power granted by the Charter is subject to a condition relating either to the *form* in which the security shall be made in order to be valid, or to some preliminary proceeding, *extraneous to the acts* of the corporation or its officers, securities issued not in the prescribed form, or without the preliminary proceedings had, are subject to defenses in consequence thereof, even in the hands of *bona fide* holders."

The Court illustrates this by the case of a statute requiring as a preliminary to the issuing of bonds by a county, town or other corporation, that the assent of a certain proportion of voters or tax payers shall first be obtained; and then observes:

"But this doctrine does not prevail in those instances in which the right to issue such securities is by the Charter *conditioned upon the performance of acts by the corporation or officers relating to the management of the affairs of the company.*"

The Court then proceeds to cite the various English and American cases, and states they all support the proposition that (p. 564):

"Persons dealing with such companies are, as was said by Lord Hatherly, affected with notice of all that is contained in the statute and the articles of association; but with regard to all that the directors do with reference to what he calls 'the indoor management of their concern,' that is a thing known to them and to them only, and persons dealing externally with those managing the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, *are not to be affected by any irregularities* which take place in the internal management of the company."

The application of this reasonable and well sustained doctrine is manifest. There is not in the national bank legislation any *express* power to borrow money. But the

associations have full *banking* powers. At common law and by constant and universal custom such power embraced the faculty of borrowing. This Court admits the power in the *Western National Bank* case. But it is suggested in that case that there ought to have been an order or authority by the directors. Let it be granted: yet under the authorities, *the lender has the right to presume that this was done.* Further than this: if the Act of Congress had said that the bank *may* borrow, upon such authority or direction; or even that it *shall not* borrow without it, the cases hold that when its officers *do* borrow, in the name of the bank, the lender may presume the authority of the directors.

Without further comment we refer to the following decisions additional to these, and those already cited under other heads, as confirming the propositions heretofore made:

Smith v. *Hull Glass Co.*, 11 C. B. 897.

Greaves v. *Legg*, 2 H. & N. 210.

Mahony v. *E. Holyford Mining Co.*, L. R. 7 H. L. 869.

County of Gloucester Bank v. *Rudry Merthyr, etc., Colliery Co.*, [1895] 1 Ch. 629.

Barwick v. *English Joint Stock Bank*, L. R. 2 Exch. 259, 266.

Swire v. *Francis*, L. R. 3 App. Cas. 106.

Montaignac v. *Shitta*, L. R. 15 App. Cas. 357.

In re Hampshire Land Co., [1896] 2 Ch. 743.

Creswell v. *Lanahan*, 101 U. S. 347.

Hanson v. *Head* (Sup. Ct. N. H.), 38 Atl. 788.

First Nat. Bank of Birmingham v. *First Nat. Bank of Newport* (Sup. Ct. Ala.), 22 South. 976.

Miller v. *American Mutual Accident Ins. Co.*, 92 Tenn. 167; 20 L. R. A. 765.

And we submit that, so far as the Chemical Bank is

concerned, the authority to borrow the money must be presumed.

V. RATIFICATION ESTABLISHED.

Thus far we have urged that the decree should be affirmed because the Chemical Bank was entitled to presume the loan was authorized. But we need not rest upon that ground solely; for the facts of the case establish ratification, both by the Fidelity National Bank before its dissolution, and by its receiver and creditors since.

Ratification is conduct of a person or his privies estopping him or them from asserting that a contract made or act done in his name was unauthorized. Ordinarily here, as elsewhere in the law of estoppel, the estopping conduct must have been done with knowledge of all material circumstances. But knowledge in this connection means not what one does know, but what he should know, that of which he has notice; and notice means information which should prompt to inquiry. If such information be given, the party receiving it is conclusively presumed to have all the knowledge which inquiry would have disclosed.

Speaking with extreme exactness, a corporation can have neither knowledge nor notice; for while in theory a juridical person, in truth it is but an imaginary being. It has no physical existence, and physical or psychical acts or powers can be attributed to it only by figure of speech. It neither sees, hears, nor feels of itself, but only through the senses of others—its agents. In every thing it acts by agents; the knowledge of its agents is its knowledge, and notice to them is notice to it.

THE LOAN WAS RATIFIED BY THE FIDELITY NATIONAL BANK BEFORE DISSOLUTION.

We might safely rest the claim that the Fidelity National Bank had notice of the loan that was made to it by

the Chemical National Bank upon the letter of March 2, 1887, which the cashier of the latter bank wrote to Baldwin, the cashier of the Fidelity Bank, advising him that the loan had been credited upon the books of the Chemical Bank (Rec., p. 33). Of course it will be urged by our opponents that Harper was attempting to defraud the Chemical Bank, and that Baldwin was his accomplice. The latter contention is only an inference; and if true is immaterial. For while it is now well settled that the general rule, that notice to the agent is notice to the principal, is subject to an exception in certain cases where the agent is himself perpetrating a fraud upon his principal (*American Surety Co.* v. *Pauly* [No. 1], 171 U. S. 133), yet this exception does not apply to those cases where the agent has been designated by the principal as the proper person to receive the very information with notice of which the principal is sought to be charged, so that the notice is received by the agent in the strict performance of his duty. To hold otherwise would overthrow the whole law of agency, and establish that loss by the fraud of an agent in the performance of his duty should fall upon the innocent third party, and not upon the principal who held the agent out as worthy of trust and confidence, and as the proper channel of communication to him. It was the Fidelity Bank that published to the world that letters sent to it upon matters of business should be addressed to Ammi Baldwin, its cashier; the Chemical Bank acted upon that invitation when it answered Harper's request by a letter to Baldwin; and the information thus given him was given to his principal, the Fidelity Bank.

There is no occasion for us to cite other authorities upon this proposition. Many are collected in the *Pauly* case. But the language of the Circuit Court of Appeals (Mr. Justice Jackson, and Judges Taft and Sage) in *First Na-*

tional Bank of Evansville v. *Fourth National Bank of Louisville*, 16 U. S. App. 1; 56 Fed. 967, is so pertinent that we can not refrain from quoting it. There a defaulting bookkeeper suppressed letters received, so as to hide his own irregularities. Nevertheless, his principal, the bank, was charged with knowledge of the contents of the letters thus suppressed. The Court, speaking through Sage, D. J., said:

"Here it was the business of Schor, the plaintiff's bookkeeper, to receive and open and distribute letters addressed to the bank and coming by mail. Hence the Court below rightly charged the jury that if they found that the letters mailed by the defendant were delivered to him, they should find that they were delivered to the bank. Now, it is claimed that because he secreted those letters, and kept them from the actual knowledge of the bank, the bank is not chargeable with notice of their receipt or of their contents, because he had no right to secrete them, and to keep them. As well might it be claimed that the bank could repudiate a payment made to its collecting agent by its debtor, because he had embezzled it, instead of paying it over. Schor's authority was to receive the letters for the bank, and the collector's agency, in the case put, was to receive money for the bank. Delivery in the one case was delivery to the bank, and payment in the other case was payment to the bank, and what Schor or the collector afterward did concerned only themselves and the bank, so far as the rights and interests of the parties were involved."

But again it is not necessary for us to stop here. Knowledge is carried to the bank and its responsible officers without being filtered through either Harper or Baldwin.

As stated heretofore, the practice between the two banks was for the Chemical Bank to render monthly accounts current to the Fidelity Bank, which would be checked over by the latter bank, compared with its books, and dis-

crepancies or other items calling for remark inquired about. So far as the Fidelity Bank was concerned, this matter was in the charge of its general bookkeeper, J. Harry Watters. The Chemical Bank furnished its account current for the transactions of March, 1887, early in April of that year; this was offered in evidence, Watters Exhibit No. 10, and will be found at the end of the record as now printed. The fourth item on the credit side of that account, under date of March 2, shows the loan here in question in the following words, "Tem. Loan, $300,000." On his examination, prior to the first appeal, Watters said (QQ. 48–49, Rec., p. 47) that this "account current was received by the Fidelity National Bank, and turned over to me about the 4th or 5th of April. It was checked up with the books of the Fidelity National Bank, and found to be O. K." And he then "filed it away among the papers of the Fidelity National Bank."

Being recalled after that reversal and examined somewhat with reference to this account, he endeavors to justify his action in filing this account away without further inquiry or report; but his attempted justification simply confirms the proof of his carelessness; it all comes to the point that if the entry had been different from what it was it would have meant something else—a proposition which no one will dispute. He is, indeed, but quibbling upon words; for it will be seen that by the word "entry" he is speaking only of the date and the amount, and where he uses the word "explanation" he means the explaining remark—in this instance the words "Tem. Loan." But when he is pinned down to the idea expressed by *this entry with this explanation*, to use his own terms, his answer is plain and unequivocal; see Rec., p. 235:

"Q. 45. Well, Mr. Watters, when it appears on the account rendered by the Chemical National Bank to the

Fidelity National Bank as a 'Tem. Loan' does not that signify necessarily a temporary loan from the Chemical National Bank to the Fidelity National Bank? A. Yes, sir."

"Q. 50. But as it stands it signifies a loan by the Chemical Bank to the Fidelity National Bank and nothing else, does it not? A. Yes, sir."

There can be not the slightest room for doubt, therefore, but that notice of this loan from the Chemical Bank was received by Watters, the general bookkeeper of the Fidelity Bank early in April, 1887, while he was acting in the performance of his duties as an agent of that bank. And, furthermore, as he made the false entries of March 2, dictated by Harper, he had all the threads in his hand, and knew, or should have known, the whole fraud.

The notice thus given to Watters, the general bookkeeper, was notice to all his superiors, including the board of directors, was notice to the bank.—We have already stated briefly the rule that notice to the agent of a corporation is notice to that corporation, and the reason for it. The only question here is whether Watters was the agent of the corporation. His position is stated by himself. He was general bookkeeper and general utility clerk (Rec., p. 72, Q. 2); it was his duty to examine these monthly accounts and to supervise the correspondence resulting therefrom. (Rec., pp. 224–225; QQ, 1–5; pp. 228–233, XQQ. 2–38.) He was, therefore, the agent specially designated by the Fidelity Bank, to receive information coming in the form of an account current, and to transmit the same, where necessary, to others. If he failed in performing his duty, or was negligent regarding it, that is the misfortune and loss of the bank, his principal, whose business he was doing, not of its customer who corresponded with the bank in the regular way.

The Chemical Bank was not dealing with J. Harry Watters in the matter of these accounts. Its dealings were with the Fidelity Bank. To the Fidelity Bank it transmitted the account, which showed that it had made a loan to the Fidelity Bank on March 2, 1887, of $300,000, and that without this loan the account of the Fidelity Bank with it for that month would have been overdrawn on March 28th by $296,000, and on April 1st by $332,000. This account the Fidelity Bank turned over to Watters to investigate. Whatever he learned or should have learned by such investigation, his principal, the Fidelity Bank, as a matter of law knew; and the board of directors of that bank, if they be considered its active managing body, are chargeable with, and can not escape the responsibility of, the same knowledge. No remissness, or negligence, or even fraud of Watters in performing his duty will shield them, so far as the Chemical Bank is concerned. When once it is established, as this record does establish, that the entry which we have quoted is but a short form of stating that on March 2, 1887, the Chemical National Bank loaned to the Fidelity National Bank the sum of $300,000, the proved reception of that account at the Fidelity Bank carries with it knowledge to that bank and all its officials, that such a loan was made.

This Court has previously had occasion to pass upon questions which are identical in principle with that at bar upon this point. We have already quoted a passage from *Martin* v. *Webb*, 110 U. S. 7, which is in point (*supra*, p. 113). The subject was also considered in *Kissam* v. *Anderson*, 145 U. S. 435. There it appeared that Warner, the cashier of the Albion Bank, was engaged in stock speculations upon his own account in New York, through Kissam, Whitney & Co., brokers of that city. In the course of those speculations he sent to Kissam, Whitney & Co.

drafts of his own bank, signed by him as cashier, to their order on the Third National Bank of New York for the aggregate amount of $103,000. The proceeds of these were applied to his stock account; and upon the other hand, Kissam, Whitney & Co. at sundry times returned to the Third National Bank sums aggregating over $63,000, which were entered by that bank to the credit of the Albion Bank, and notice thereof was sent, in the regular course of business, by the former to the latter bank. Of these, however, only $25,850 were charged to the Third National Bank upon the books of the Albion Bank. The Albion Bank having failed and gone into the hands of a receiver, he brought suit against Kissam, Whitney & Co. for the amount of the drafts which had been sent to them by Warner; and the Court below had held that the defendants were not entitled to credit for the moneys they had deposited in the Third National Bank to the credit of the Albion Bank. This Court held that this was error, and with reference to the particular point which we are now discussing, speaking through Mr. Justice Brewer, said, (p. 422):

"If it be said that no officer of the Albion Bank knew of these deposits except Warner, the wrongdoer, and that he subsequently drew out most of these moneys in drafts to further other wrongs, the reply is, that the other officers and directors of the Albion Bank were chargeable with knowledge of these deposits. If, through their negligence, they did not in fact know, that is a matter for which the Albion Bank, and not the defendants, were responsible. Kissam, Whitney & Co. had no supervision over its affairs, no knowledge as to how those affairs were managed. They were not called upon to go to Albion and hunt up the various officers and directors, and inform them, one by one, personally, that these moneys had been deposited to their credit in the Third National Bank. It was enough

that they deposited them, and that that bank, in the regular course of business, by monthly statements, informed the Albion Bank that it received and held those moneys."

In *Knights of Pythias* v. *Kalinski*, 163 U. S. 289, speaking as to the effect of reception of assessments by a benevolent order from a member after delinquency upon his part sufficient to forfeit his membership, this Court, speaking through Mr. Justice Brown, said (page 298):

"Granting that the continued receipt of premiums or assessments after a forfeiture has occurred will only be construed as a waiver, when the facts constituting a forfeiture are known to the company, *Insurance Co.* v. *Wolff*, 95 U. S. 326; *Bennecke* v. *Insurance Co.*, 105 U. S. 355, this is true only of such facts as are peculiarly within the knowledge of the assured. If the company ought to have known of the facts, or with proper attention to its own business, would have been apprised of them, it has no right to set up its ignorance as an excuse. In the ordinary course of business between the lodges and the sections of the endowment rank, and under the instructions contained in the circular of the Supreme Chancellor of May 20, 1887, it became the duty of the keeper of the records and seal of the lodge to which Kalinski belonged to notify the secretary of the proper section of the endowment rank of the fact that he was in arrears for dues, and his failure to do this should be imputed to the defendant, as representing the order, rather than to Kalinski."

In *Marsh* v. *Keating*, hereafter to be mentioned more specifically in another connection (*infra*, p.), Park, J. delivering the opinion of all the judges to the House of Lords, who adopted that opinion, speaking of the liability of a firm of bankers for money credited to their account with another bank, and shown by entry upon their passbook with that bank, though not upon their own books be-

cause of frauds of one of their partners, said, 2 C. & F. 250, 289 (also reported in 1 Bing., N. C. 198, and 1 Scott, 5) :

"But it is urged, that the present defendants had no knowledge that the money was the property of the plaintiff, being perfectly ignorant, as the special verdict finds, of the commission of the forgery, of the sale of the stock, or the payment of the produce of such sale, into their account at Martin & Co.'s.

"It must be admitted that they were so far imposed upon by the acts of their partner, as to be ignorant that the sum above mentioned was the produce of the plaintiff's stock; but it is equally clear that the defendants might have discovered the payment of the money and the source from which it was derived, if they had used the ordinary diligence of men of business.

"If they had not the actual knowledge, they had all the means of knowledge; and there is no principle of law upon which they can succeed in protecting themselves from responsibility, in a case wherein, if actual knowledge was necessary, they might have acquired it by using the ordinary diligence which their calling requires."

Having knowledge, the omission to repudiate the loan was a ratification of it.—What occurred after the account was received has been stated in the statement of facts. (*Supra*, pp. 15–19). It was the custom, as stated, for the Fidelity Bank to write, asking explanations of matters set forth in the account which were not recognized as correct; and the explanation was written upon the same sheet containing the request and returned. Whether any explanation at all was asked early in April with reference to this account for March, as was the custom, is not proved. If such explanation had been requested, it, with the answer to it, should have been found on the files of the Fidelity Bank. It was not there, although explanations for the subsequent months were found and produced, and offered in evidence. Some

items of the account for March were unquestionably the subject of explanation, for the letter of the Chemical Bank of May 11, 1887, answers inquiries made with reference to them (Rec., p. 269). This much, however, can be affirmed as indisputable, that no question or comment was ever made as to the loan of March 2. So far as the Chemical Bank was concerned, that loan was permitted to stand as an accepted and established fact. In faith of that loan it paid checks of the Fidelity Bank against it; it gave up, in April, $10,000 of the security transmitted with the request for the loan; it permitted the substitution of other securities in May, 1887; it made large advances in June, 1887; and by June 20, when the Fidelity Bank suspended payment, it had allowed it to overdraw, after crediting it with this loan of March and with the loan of $200,000 in June, to the extent of $89,000. (Armstrong Exhibit 6, Rec., p. 105.) Surely this is acquiescence on the part of the Chemical Bank, and much more. The loan was made; the money was credited to the account of the Fidelity Bank; knowledge of the loan is conclusively presumed; the money loaned was actually used and applied to the credit of obligations of the Fidelity Bank, which are admitted in this record to have been valid—for this application of the checks paid from the loan is set forth in the March account, Watters Exhibit 10, exhausting the whole amount of the loan, and Watters says that the account was checked up with the books of the Fidelity National Bank, and found to be O. K., which proves that all of these checks were regularly issued; and furthermore, the reconcilement sheet of this account (Rec., pp. 259, 260) shows that the checks drawn by the Fidelity Bank had been compared with the checks paid by the Chemical Bank, and those drawn but not presented noted (Rec., p. 159, McCauslen, QQ. 28, 29); and the reconcilement sheets for April and

May (Rec., pp. 261, 264) show that while there had been a discrepancy of $50.50 in the February account, there was none in the subsequent ones. Hence there is proved beyond dispute not only a loan and knowledge of the loan, but actual use of the money loaned. That facts such as these establish ratification can not be questioned. We have already (*supra*, p. 139) called attention to *Kissam* v. *Anderson*, 145 U. S. 435, which is so closely analogous as to be authoritative, were it the only decision upon the subject. But the point presented is identical with that decided by this Court in *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. 96. The question there presented was as to the right of a depositor to surcharge and falsify an account rendered him by his bank after he had retained it without objection longer than was reasonably necessary for its examination. It appeared that the errors claimed by him had been caused by checks raised and cashed by one of his clerks, and that the auditing of the account on its return had been entrusted to the same clerk, who, naturally, had not advised his employer of the state of affairs. The conclusion reached by the Court is accurately stated in the syllabus as follows:

"A depositor in a bank, who sends his pass book to be written up, and receives it back with entries of credits and debits, and his paid checks as vouchers for the latter, is bound personally or by an authorized agent, and with due diligence, to examine the pass book and vouchers, and to report to the bank, without unreasonable delay, any errors which may be discovered in them; and if he fails to do so, and the bank is thereby misled to its prejudice, he can not afterward dispute the correctness of the balance shown by the pass book."

The ethics as well as the law of the matter are summed up by the Court in the following sentence (p. 112):

"Where a duty is cast upon a person, by the usages of business or otherwise, to disclose the truth—which he has means, by ordinary diligence, of ascertaining—and he neglects or omits to discharge that duty, whereby another is misled in the very transaction to which the duty relates, he will not be permitted, to the injury of the one misled, to question the construction naturally placed by the latter upon his conduct."

Previously, the case of *Burton* v. *Burley*, 9 Biss. 253; 13 Fed. 811, had been decided by Judge Drummond. The syllabus, which sufficiently shows the applicability of the decision, is:

"Where the president of National Bank A. instructed its correspondent, Bank B., to charge up against the former bank the amount of a private note which the latter bank held against him, in payment of said note, and this was done, and account rendered showing the transaction, which was accepted by the first bank; *Held*, that Bank A. was estopped from denying the correctness of the charge, and that a receiver subsequently appointed could not set aside the transaction."

Still earlier in *Gold Mining Co.* v. *National Bank*, 96 U. S. 640, 644, this Court had said:

"The judge's charge on the subject of the ratification by the company of the acts of Sabin contained all that it was necessary to say to the jury. It was, in substance, that if Sabin was the agent of the company in working its mines in Colorado in 1867 and 1868, without authority to borrow money in its name, but did in fact borrow large sums of the plaintiff in its name, if, on the 16th of December, 1868, the president of the company was informed of such borrowing and of the amounts, and a demand was made for the payment thereof, and if within a reasonable time thereafter the company failed to disavow the acts of its agent in so borrowing the money, the jury would be authorized to

consider the company as assenting to what was done in its name. We consider this charge entirely correct."

And in *Insurance Co.* v. *McCain*, 96 U. S. 84, where it appeared that the assured had paid a premium upon his policy to a former agent of the Insurance Company without notice that his agency had ceased, and that four months afterwards this ex-agent had rendered a statement to the company showing the payment, after which the company kept silent while the assured lived, this Court said:

"The law on the silence of the company, after receiving the statement of the agent that the premium had been paid, is also free from doubt. Silence then was equivalent to an adoption of the act of the agent, and closed the mouth of the company ever afterwards."

While it is thus manifest that it is not necessary to go beyond the decisions of this Court for conclusive authority upon the exact question presented, it is not inappropriate to refer the Court to cases elsewhere supporting the same conclusion. The Court will already have observed, when reading the cases which we have cited as to the presumption of authority to make the loan, that many of them establish the sufficiency of the ratification here shown. In addition to those, we beg leave also to refer to the following:

Ogilvie v. *West Australian Mortgage and Agency Corporation, Limited*, [1896] App. Cas. 257.
Mundorff v. *Wickersham*, 63 Pa. St. 87.
Pope v. *Armsby Co.*, 111 Cal. 159.
Busch v. *Wilcox*, 82 Mich. 315.
Hawkins v. *Fourth National Bank*, 150 Ind. 117.
Morse v. *Ryan*, 26 Wis. 357.
Thomas v. *City Bank of Hastings*, 40 Neb. 501.
Trademens' National Bank v. *Bank of Commerce* (N. Y. Sup. Ct.), 6 App. Div. 358.

Bank of Lakin v. *Nat. Bank of Commerce*, 57 Kan. 183.

St. Paul and Minneapolis Trust Co., v. *Howells*, 59 Minn. 295.

International Trust Co., v. *Norwich Union Fire Ins. Soc.*, 36 U. S. App. 277; 71 Fed. 81.

American National Bank v. *National Wall Paper Co.* 40 U. S. App. 646; 77 Fed. 85.

Dittey v. *Dominion Nat. Bank*, 43 U. S. App. 613; 75 Fed. 769.

Am. Exch. Nat. Bank v. *First Nat. Bank*, 48 U. S. App. 633; 82 Fed. 961.

THE RECEIVER AND CREDITORS OF THE FIDELITY NATIONAL BANK OBTAINED ACTUAL KNOWLEDGE OF THE FACTS, AND RATIFIED, BOTH BY SILENCE AS REGARDS THE CHEMICAL NATIONAL BANK, AND BY PROSECUTING THE DIRECTORS AND RECOVERING FROM THEM FOR NEGLIGENCE IN THIS TRANSACTION.

The Court will remember the facts: that notice of the loan was given to Armstrong, the receiver of the Fidelity National Bank, as early as July 6, 1887, if not previously (see letter of that date, Rec., p. 268); that the application to this loan of the collaterals forwarded in June led to a dispute between Armstrong and the Chemical Bank in November, 1887, in which the existence of the loan was not disputed, but merely the right to apply those collaterals toward its payment (Armstrong's letter of November 14, 1887, Rec., p. 24); that this dispute resulted in a suit brought in New York by the appellant, in which the right of the Chemical Bank so to apply the June collaterals was denied, but the existence of the loan as an indebtedness was not challenged; that previously, on September 18, 1887, the receiver had brought suit against the directors of the Fidelity Bank to recover damages for neglect of

their duties, counting, among other things, upon their permitting an embezzlement by Harper during the period covering the time of this loan of more than the sum lent, and suffering the issue of false obligations (Rec., p. 271); that during the progress of this suit, J. Harry Watters was called to the stand, and on January 19, 1889, testified fully as to the transaction here in question (Rec., pp. 206–222); that upon that bill and that testimony, the receiver, under remonstrance of only three of the creditors and stockholders, though all were notified, took a decree on April 16, 1890, against some of the directors for $450,000 (Rec., p. 289), which decree has been satisfied; that all this was done prior to the filing of the bill in this cause; that the claim upon which the bill in this case was founded was filed with the receiver shortly before the rendition of that decree, and was rejected May 2, 1890, with a letter which did not deny, but inferentially admitted, the validity of the claim (Rec., pp. 101–103); and that the original answer filed in this cause also in legal effect admitted the validity of the claim (Rec., p. 8).

These facts, we submit, are sufficient in themselves to establish a ratification by the receiver and the creditors and stockholders of the Fidelity Bank, acting on their own behalf, since its dissolution. There was no possible theory upon which the receiver and creditors could recover against the directors for any thing done by Harper in this transaction, unless Harper in what he did was the agent of the Fidelity Bank. If he was not such agent, then his acts had in no way harmed those creditors and stockholders; and there could be no negligence of the directors in that connection, nor liability by them to the bank or those interested in it. The very assertion of such liability on the part of the directors was necessarily and unavoidably an assertion that

Harper was an agent of the Fidelity Bank in the transaction. And if his agency had theretofore been disputed in law, it could not be so thereafter; for all the facts were then known, and proceeding upon the theory that he was an agent was a ratification. The receiver and creditors had come to the parting of the ways; they made their election and they must abide by it. It would be a strange thing indeed if a principal could recover from a head-agent for permitting a sub-agent to transcend his powers, or from a surety for his agent upon the theory that the agent had been delinquent, and thereafter repudiate as unauthorized the very transaction because of which his recovery against the head-agent or surety was obtained. Yet these are the very propositions which must be established to defeat this claim of ratification.

The charter of the Fidelity Bank had been forfeited and the corporation dissolved on July 12, 1887, as is admitted in the pleadings (Rec., pp. 5, 17); thereafter the only representative of the corporation was the receiver. His action and his knowledge from that time is the action and knowledge of the corporation and of all interested in it; so that ordinarily it would not be necessary to look beyond him. But when we see, as we do here, that he had brought this suit to enforce the liability of the directors, and had prosecuted it under the guidance of learned counsel, and—his evidence having been completed—had then received an offer of compromise, which he submitted to the Comptroller of the Currency, by whom he was directed to lay the matter before the Court; and when we see further that on such petition to the Court, and the statement that a number of the largest creditors recommended it, the Court directed notice to be given to all claimants upon the fund, and, after hearing, ordered the compromise to be made, there being practically no re-

sistance, it is obvious that in this matter the receiver had the support and indorsement of every person who had a voice upon the subject. Nor does it alter or diminish the significance to be given to the transaction that other claims were alleged against the directors besides this. It is sufficient that *this claim* was alleged and proved and compromised. After such settlement had been made how could the Chemical National Bank maintain any action against Harper because of this transaction—aside, of course, from his indorsement upon the certificate of deposit? He did not deal with it as a principal, but only as an agent. He could be held responsible only for misrepresenting that he was an agent. And if suit were brought against him upon this theory, what response could the Chemical Bank make, when he in defense said: My principal adopted the agency and made my associates pay for permitting it?

It was long ago settled that where an agent entered into an unauthorized contract with a third party, the principal ratified that contract by collecting its proceeds or their equivalent either from the third party or from the agent. *Billon* v. *Hyde*, 1 Atk. 126; *Wilson* v. *Poulter*, 2 Strange, 859; *Vernon* v. *Hanson*, 2 Term, 287; *Cushman* v. *Loker*, 2 Mass. 106. And therefore over one hundred years ago this Court declared that where the United States sued its agent for issuing a false certificate of indebtedness, they thereby estopped themselves from denying the validity of the certificate. *Fenemore* v. *United States*, 3 Dall. 357. There has been no change in the law since that time. *Central Trust Co.* v. *Ashville Land Co.*, 43 U. S. App. 1; 72 Fed. 361; *The Farmers' & Merchants' Bank of Elk Creek* v. *Farmers' & Merchants' National Bank of Auburn*, 49 Neb. 379. So here, by holding Harper and his associates to account for the making of this loan, and not merely for the dam-

ages which had ensued to the Fidelity Bank by its making,—for no damages had ensued if the Fidelity Bank was not responsible upon the loan,—the receiver, creditors, and stockholders of the Fidelity Bank ratified the loan with just the same consequences as if the directors had authorized it in the first instance.

VI. AS THE MONEY LOANED ACTUALLY WENT TO THE BENEFIT OF THE FIDELITY NATIONAL BANK, IT IS LIABLE THEREFOR EVEN IF THE LOAN WERE UNAUTHORIZED.

The Court will remember that the proceeds of the loan were credited to the account of the Fidelity Bank with the Chemical Bank, and were checked out of that account by its authorized checks, and so went to pay its valid liabilities. Every dollar borrowed went to the use of the Fidelity Bank; and if the loan had not been credited, the same checks having been presented, the Fidelity Bank would have been indebted to the Chemical Bank in the same amount by way of over-draft. No dispute or controversy can arise upon the record with reference to these facts; the only question is whether their legal effect is in any way altered by the fact that on the same day upon which the loan was credited in New York, Harper took credit in Cincinnati for the same amount. The Chemical Bank was in absolute ignorance of what Harper had done in Cincinnati, and never had means of knowledge until the facts were developed in the litigation after the Fidelity Bank failed. This was not true as to the latter bank and its directors; for what he had done in Cincinnati was shown by their own books and papers; and furthermore, knowledge of what he had done in New York was actually given to Baldwin, the cashier, and to Watters, the bookkeeper, and

the information given to the latter remained on file always accessible.

To refuse relief because of Harper's embezzlement would be to relieve those guilty, and to punish those innocent, of negligence. Indeed, not only was there negligence with regard to the account forwarded by the Chemical Bank, but in the making of the entries whereby Harper received credit at Cincinnati for $300,000. These were made simply upon his verbal instructions, without the production of a scrap of paper to warrant them. It is, of course, a very usual thing for funds to be transferred and credits to be given by book entries; but such transactions should be made only upon letters of advice. And it is a most remarkable thing that such a thing should be done on the order merely of him who receives the credit. It may be the duty of a clerk, from a banker's point of view, to make every entry which his superior directs him to make; in other words, he may be a mere machine. But we should very much dislike to be upon the bond of a clerk who took that view of his duties.

Assuming, however, that in the interests of due subordination it is proper for a clerk to make entries directed by his superior in the interest of that superior, and without proof other than his word, it certainly is further his duty to report what he has done to some other superior. The proposition is, we think, self-evident. Counsel for the appellant undertook to examine some of the bankers who were called to the stand with reference to this matter of transfer of funds, and to show by them that it was a common thing for a person to take credit at a bank in Cincinnati in return for a credit given to that bank in New York; and in that way to show that the Cincinnati part of Harper's transaction was not extraordinary. While they actually said that the clerk's business was to do what he was told,

yet they further said that it was extraordinary to direct the making of such an entry without producing a letter of advice authorizing the credit; and so far as they were examined by us (for we did not think it necessary to question them all upon so evident a proposition), said further that the clerk who had made such an entry in favor of his superior upon his word only, should at once inform some other superior, and should keep his eye upon the account current next sent by the corresponding bank where the counter credit was alleged to have been given. See the testimony of M. M. White, Rec., pp. 169–172; W. S. Rowe, Rec., pp. 189–191; H. C. Yergason, Rec., pp. 194, 195; G. P. Griffith, Rec., pp. 198–200.

But it matters not what Harper did at Cincinnati. His transactions there are not and can not be connected with the transactions in New York. With the former the Chemical Bank was in no way connected. At the time he made the transfer of funds in Cincinnati, he had no knowledge that the loan had been or would be made; if he trusted to its making, this was pure trust and assumption upon his part; for the only advice given of it was by the letter mailed on March 2, which could not reach the Fidelity Bank before March 4. A little appearance of connection and complication results from the form in which Harper put, and no doubt purposely put, his proceeding; for by labeling his transaction at Cincinnati a transfer of funds, he suggests to the mind the idea that there was in fact such a transfer, and therefore an identity of the funds, *i. e.*, that the money which he had credited to his account in Cincinnati was the identical money which the Chemical Bank lent to the Fidelity Bank in New York. But this is not true. Although Harper had a magician's power over his colleagues in the directory of the Fidelity Bank, he was not otherwise a master of

sorcery. By his mere *ipse dixit* he could not transfer money from the vaults of the Chemical Bank in New York to those of the Fidelity Bank in Cincinnati. The money which the Chemical Bank lent to the Fidelity Bank never left New York except as it was drawn from the Chemical Bank upon the checks of the Fidelity Bank. Indeed no money, as a matter of fact, passed in the transaction. A credit was extended by the Chemical Bank to the Fidelity Bank, and nothing more. Harper took a counter credit at Cincinnati. But to the latter the Chemical Bank was no party, and of it that bank remained in ignorance. The two transactions are altogether separate and distinct.

A very simple test shows the truth of this. Suppose Harper had died immediately after taking the false credit in Cincinnati and while it remained unimpaired upon the books of the Fidelity Bank; and suppose that in other respects this transaction remained as it happened; that the Fidelity Bank had drawn upon the Chemical Bank and exhausted the credit of $300,000 which had there been given it. Could the Fidelity Bank have maintained for an instant that it was not liable for the return of that money so borrowed from the Chemical Bank? Evidently not. Having used the money, the Fidelity must repay it, and could not turn the Chemical Bank over upon Harper's estate, and this although Harper's estate still had a credit of $300,000 with the Fidelity Bank. The false credit which Harper took of itself entailed pecuniary damage upon no one. It was when he began to draw upon that credit that damage arose. When this occurred, if it occurred at all, there is no proof in this record. *Non constat*, for any thing that here appears, but that Harper's account with the Fidelity Bank showed a balance to his credit of over $300,000 until long after the account current of the Chemical Bank for March, 1887, was received. All we know upon

that subject is the statement of Watters (Rec., p. 83, Q. 106) that ultimately upon the failure of the bank in June, 1887, it was discovered that he had drawn out of his account upon his checks much more than $300,000. But when these checks were drawn, and what other deposits were made, are matters as to which we are in ignorance. We only know that the president of the bank was very well satisfied with the state of his account (Rec., p. 180, QQ. 16–18; p. 182, XQQ. 13–15).

Non constat again, for any thing that appears in this record, but that on February 28, 1887, when Baldwin issued the certificate of deposit in the name of Harper, the latter had over $300,000 to his credit, and that his account was then charged with this certificate of deposit. If so, and the burden is on the appellant to show that this was not so, that certificate was beyond question a valid obligation of the Fidelity Bank. The burden of disproving this fact is not sustained by evidence of entries on the stubs of the certificate book, throwing suspicion upon the certificate; for these might result from the carelessness of an entry clerk having charge of the certificate book; moreover, mere suspicion is not enough; the proof must go farther, and show that no consideration was in fact given for the certificate to avoid it as a valid obligation.

There could not be even a *claim* of right of action, or the slightest pretense upon which to base a demand, in favor of the Fidelity Bank against any one for substantial damages because of the entry Harper caused to be made upon its books, if that were a false entry, until he had taken advantage of it by drawing against it. Till that time, while the transaction would be criminal, it would be *injuria absque damno*. And when Harper did draw against that credit, the right of action would be only to

the extent to which he did draw, and would be against him, and not the Chemical Bank.

Thus the assumed identity and continuity between the loan made by the Chemical Bank and the actions of Harper at Cincinnati fail. As between the Chemical Bank and the Fidelity Bank, and by the action of the officers of the latter bank, it came into possession of the proceeds of that loan of $300,000 by the deposit to its credit in the Chemical Bank; and against these proceeds the Fidelity Bank drew by the authorized drafts and checks of its officers in the usual course of business until, before the month had expired, the credit had been exhausted. If that credit had not been given it must have furnished other moneys to meet those drafts and checks. To allow the defense now interposed to succeed would, as between the two banks, be to allow the Fidelity Bank to retain the $300,000 without any return to the Chemical Bank, upon the allegation of fact, wholly immaterial to the Chemical Bank, that an officer of the Fidelity Bank had swindled his own bank out of $300,000, and this without even furnishing direct and specific proof that such a swindle had taken place.

Inasmuch as the loan was not merely credited to the account of the Fidelity Bank, but was drawn by it *by duly authorized checks* in the regular course of business, the case differs widely from *Western National Bank* v. *Armstrong*, 152 U. S. 346; for there the credit was exhausted by false and fictitious checks not issued in due course of business. Here the money loaned became as much the property of the Fidelity Bank, and as much in its possession for all practical purposes, as if legal tender money had been mailed or expressed to it, and by it physically received and placed in its vaults. And its defense is no different in legal effect than would have been a defense to such a state of facts, that after the money was received Harper had,

through advantage of his position as a trusted official, abstracted and embezzled that or other money, either by taking it directly from the vaults by theft, or by doing the equivalent by over-drawing his account. It will place the whole banking business in a very anomalous and dangerous situation if it once gets into books of authority that a borrowing bank, which has had the benefit of a loan by its application to the extinguishment of an equivalent amount of its valid obligations, can succeed in defeating its liability for the loan because its own officers robbed it. And, with all deference, it is submitted that this is all there is in this branch of the case at bar.

We have referred already to *Marsh* v. *Keating*, 2 C. & F. 250 (*supra*, p. 141). It is a case that in many respects, and particularly with reference to the point we are now considering, is closely analogous, and is indeed stronger against the defrauded principal than the case at bar. It grew out of the noted Fauntleroy forgeries which created so much commotion in English banking circles in the early part of this century, and a very interesting account of which is contained in Lawson's *History of Banking*, a book to which we have already referred. The importance of the questions involved led the House of Lords to request the opinion of the judges. This, as we have stated, was given by Park, J.; and their unanimous opinion was concurred in and adopted by the House of Lords. While the statement of facts is quite voluminous, the following is a fair summary, and gives the gist of the matter.

Keating, the defendant in error, was the owner of registered government annuities transferable at the Bank of England; Marsh, Fauntleroy, and others were partners, doing a banking business under the name of Marsh & Company; Fauntleroy forged the signature of Keating to a power of attorney to transfer the annuities, under which they

were sold and transferred to Tarbutt on December 29, 1819, and the proceeds were deposited with Martin & Co., bankers, to the credit of the account of Marsh & Co.; the deposit was entered in the pass-book of Marsh & Co. as "Cash per Fauntleroy," his name denoting the person who made the deposit; this pass-book was the usual book, furnished by the bank but kept in the possession of the depositor, in which the bank enters deposits as made, and which it balances from time to time; while a book of the firm of Marsh & Co., Fauntleroy was usually permitted by them to keep it locked up in his own desk; a corresponding entry should, of course, have been made in the other books of Marsh & Co.—as these should have corresponded with the pass-book, —but was not; nor did this credit ever appear upon the other books of Marsh & Co.; all drafts upon the account of Marsh & Co. with Martin & Co. had to be signed in the firm name, but Fauntleroy paid into that account, and by such drafts drew out, large sums for his individual purposes; the account between Marsh & Co. and Martin & Co. was repeatedly balanced between December 29, 1819, and September 13, 1824, when Marsh & Co. became bankrupts, this and other forgeries of Fauntleroy having been discovered; in the meantime Fauntleroy had caused the books of Marsh & Co. to be so kept as to show a credit to Keating of dividends upon all her annuities, including those which had been sold as above mentioned, as the same became due; all of the partners of Marsh & Co., other than Fauntleroy, were ignorant of his frauds until after their bankruptcy. The suit was to establish the claim of Keating against the assets of Marsh & Co. for the proceeds of the sale made by Fauntleroy under the forged power of attorney as for money had and received, and was prosecuted in her name for the benefit of the Bank of England. The judges having been called in, their unanimous opinion was given by Park, J.; in this

opinion he disposes of the question which is of interest here in the following manner (2 C. & F. 288) :

"But it is objected, thirdly, that the proceeds of the sale of stock never came into the hands of the defendants, so as to be money received by them to the use of the plaintiff; and the consideration of this objection involves two questions: —First, did the money actually come into the possession of the defendants? Secondly, if it ever was in their possession, had the defendants the means of knowledge, whilst it remained in their hands, that it was the money of the plaintiff, and not the money of Fauntleroy? As to the first point, the special verdict finds expressly that Simpson, the broker, paid the sum of 60,131*l.* 2*s.* 6*d.*, being the amount of the sum received from Tarbutt, (deducting one-half of the usual commission), by a check payable to Marsh and Co. into the hands of Martin and Co. to the account of Marsh and Co., at the precise time of such payment; therefore there can be no doubt but that it was as much money under their control as any other money paid in at Martin and Co.'s by any customer under ordinary circumstances. The house of Marsh and Co. might have drawn the whole of the balance into their own hands; if the same money had been paid into Martin and Co.'s as the produce of the plaintiff's stock, sold under a genuine power of attorney, it would unquestionably have been received by all the defendants to the use of the plaintiff. It would not the less be money received by the partners of the firm, because (as found in the special verdict) it was entered in the account as 'Cash per Fauntleroy,' or because it never appeared in the house-book, or any other books of Marsh and Co., but only in the pass-book of that firm with Martin and Co., or because it never came into the yearly balancing of the house of Marsh and Co., or in any other manner into their books. Those several circumstances prove no more than that Fauntleroy, one of the partners, deceived the others, by preventing the money from being ultimately brought to the account of the house; but as between them and the person by the sale of

whose stock it was produced, we think the fraud of their partner Fauntleroy, in the subsequent appropriation of the money, affords no answer after it has once been in their power; and that it was so, appears to be distinctly stated in the special verdict."

Then follows the passage quoted from the same case on p. 142, *supra*. Then, after disposing of another point, the opinion concludes:

"Upon the whole, therefore, we beg to state our opinion to be, that, upon the question which has been proposed to us by your lordships, A. has a right to recover the produce of her stock against the surviving partners of the firm, who received it under the circumstances stated in the special verdict in an action for money had and received to her use."

We submit that the reasoning in this case covers and goes beyond the case at bar. There Fauntleroy swelled the bank balance to the credit of his firm with the proceeds of another's property, embezzled the money, and successfully concealed his fraud until his firm went into bankruptcy—concealed it, however, through the neglect of his associates in not examining their bank pass-book, through which his proceedings might have been traced. Here, upon our opponents' contention, Harper did exactly the same thing, only in place of depositing money secured by selling the property of a customer of a firm, he deposited money borrowed in the firm name from a customer of the firm. The account current sent by the Chemical Bank answers in all respects to the pass-book entered up by Martin & Co. There was a deposit to the credit of the firm with which the rogue was connected, notice of that deposit, and embezzlement by the rogue. The only difference between the cases is one which should *a fortiori* cause the rule applied

there to be applied here, *i. e.*, that there the embezzlement was made by checking directly upon the account where the deposit was entered, while here the alleged embezzlement was made in an entirely different place, and without drawing upon the bank where that deposit was made.

The same question was before the Queen's Bench Division very recently in the case of *Reid* v. *Rigby & Co.*, [1894] 2 Q. B. 40. The facts were that Allport, the manager of the defendants, induced the plaintiff to cash a check drawn by Allport, in the defendants' name, upon their bank account, telling the plaintiff he needed the money to pay wages; the check was never presented for payment; about eighteen months afterward Allport died, and it was discovered that he had misappropriated large sums of defendants' money; the plaintiff then demanded payment, and being refused, brought suit. The county judge found that Allport had no authority to borrow, and that he made this transaction to raise money to replace other money of defendants which he had stolen. The Court of Queen's Bench adopted the facts as thus stated, and found, furthermore, that the money received of the plaintiff had been paid into the defendants' bank account, and thereupon rendered judgment in favor of Reid.

Mr. Justice Charles, in the course of his opinion, said:

"In this case the money actually came into the possession of the defendants. Further, it seems that the defendants have had the opportunity of finding out where it came from, and as soon as it is established, first, that the money is actually in their possession; secondly, that they had the means of knowledge that it was in their possession; and thirdly, that it had been actually applied to the purposes of the defendants, the money received must be regarded as received to the use of the plaintiff."

Substantially the same question was before this Court in the case of the *Merchants' Bank* v. *State Bank*, 10 Wall. 604, which has been already so frequently alluded to. And it came before the Court again in an outgrowth from that transaction in *United States* v. *State Bank*, 96 U. S. 30. While the litigation between these two banks was pending, they had both brought suit against the United States to recover upon certificates of deposit for the gold there in controversy, which had been issued from the sub-treasury at Boston through a fraudulent conspiracy of Mellen, Ward & Co. and Hartwell, the cashier of the sub-treasury. Hartwell had embezzled from the sub-treasury a large amount, and lent it to Mellen, Ward & Co.; anticipating an examination, the certificates referred to in the case in 10th Wallace were procured and deposited at the sub-treasury, so as to cover up his deficit. The United States attempted to maintain their hold upon the certificates because of the prior frauds of Hartwell, but failed. This Court, having sustained the title of the State Bank and its liability as between the two banks, further sustains its title as against the United States, and after alluding to the cases of *Atlantic Bank* v. *Merchants' Bank*, 10 Gray, 532, and *Skinner* v. *Merchants' Bank*, 4 Allen, 290, as being strikingly like the case before them, continued (p. 36):

"But surely it ought to require neither argument nor authority to support the proposition, that, where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property can not be held by the United States against the claim of the wronged and injured party."

The only differences that can be suggested between this case and the one at bar are first, that there the em-

bezzlement preceded the deposit; and secondly, there the embezzlement and deposit occurred at the same place, while here they did not. These, however, are distinctions without a difference. The transfer of funds, which was the first step in the alleged embezzlement, here preceded knowledge of the deposit; which was prior in point of time is not known; and the connection between the two as cause and effect was certainly as strong in that case as here. That the acts occurred at different places instead of at the same place, again makes this an *a fortiori* case as compared with that.

The familiar cases of *Louisiana* v. *Wood*, 102 U. S. 294, and *Chapman* v. *County of Douglas*, 107 U. S. 348, though not cases of embezzlement, rest upon the same base in principle, that is to say, where money is paid upon an unauthorized contract, and applied to the use of the person entitled to receive it were the contract authorized, that person will be compelled, in some form of action, to repay. And the same principle was again applied in *Logan County Bank* v. *Townsend*, 139 U. S. 67.

In *Blanchard* v. *Commercial Bank*, 44 U. S. App. 556; 75 Fed. 249, a case where money had been borrowed for the use of a bank by its president, without authority delegated for that purpose, the Court was pressed with the decision in the *Western National Bank* case to the effect that the bank was not bound by a loan made by its president without special authority, and met this claim with the finding of the Court below that the bank had received the benefit of the money borrowed, quoting from the opinion of the Court below that the lending bank had placed the loan to the credit of the borrowing bank, from which it was drawn by the checks of the borrowing bank, as in the case at bar, upon which they say that the case is manifestly different from the *Western National Bank* case, and that:

"The distinction in the facts justifies the conclusion of the Court in this case that the Commercial Bank is entitled to recover judgment, not upon the ground that Atkins was authorized by the directors of the Whatcom Bank to borrow the money, but upon the ground that it received and appropriated the same to its own use and benefit."

Perkins v. *Boothby*, 71 Maine, 91, presented this state of facts: The defendants were a corporation whose agent, Cleasby, without authority, borrowed money from the plaintiff, giving its notes therefor, and used the money borrowed to pay its debts. The directors of the corporation had no personal knowledge of the loan, notes, or application of the proceeds, until after the corporation had ceased to do business and gone into liquidation, when they repudiated both loan and notes, but left the appropriation of the proceeds undisturbed. It was held that by thus retaining the benefit derived from the loan, the corporation became liable as for money had and received for the amount borrowed, with interest.

In *Gunster* v. *The Scranton Illuminating Heat & Power Company*, 181 Pa. St. 327, it appeared that Jessup was treasurer of the above named company which, for convenience, we shall call the Power Co., and was also vice-president of the Scranton City Bank, and its managing executive officer. As treasurer, on May 13, 1889, he drew a note of the Power Co. for $5,000, and discounted it at the bank, the Power Co. being credited with the proceeds; then, likewise as treasurer, he checked upon that account to the order of New York exchange for $6,000; and as vice-president of the bank, he paid that check by two drafts on New York, both drawn by him as vice-president of the bank to his own order individually—one for $4,000, and the other for $2,000. He drew the money upon these drafts and appropriated it to his own use. The bank having become in-

solvent, its assignee, Gunster, brought this suit against the Power Co. upon the note above mentioned among others. The Court below had held that inasmuch as Jessup was the only officer representing the bank who acted in the transaction, the bank was chargeable with the knowledge which Jessup had that he, as treasurer of the Power Co., had no authority to draw the check. The Supreme Court held this to be erroneous for reasons upon which we need not dwell, and then continue (pp. 338–339):

"The real question is, in what capacity did Jessup commit the fraud? And it is clear that it was as treasurer of the appellee. It was as treasurer he presented the notes for discount, and as treasurer he drew the checks for the proceeds. Both acts were within his authority as treasurer and would have been lawful if they had been honest, but he drew the money on drafts which were the property of the company, and when he embezzled the money it was the money of the company. The bank had no part in his act, and gained nothing by it. The fraud had its inception and its consummation in acts done in his capacity of treasurer of the defendant company, and it should bear the loss."

No diagram is necessary to show the appositeness of this conclusion to the case at bar.

Another case in point is *Bank of Lakin* v. *National Bank of Commerce*, 57 Kan. 183. The suit was brought by the National Bank of Commerce against the Bank of Lakin on two notes signed by the latter by its cashier. The Bank of Lakin denied the authority of its cashier to borrow the money, and counter-claimed for collateral which had been sent with the notes and collected. The Court below gave judgment for the plaintiff, finding that the money borrowed had been received by the Bank of Lakin, and that the only payment thereon had been from the collaterals. This finding was excepted to as not sustained by the evidence, which, so

far as appears from the report, was only that the notes had come by mail, were discounted in regular course, credited to the Bank of Lakin, and the proceeds in part expressed to it, in part paid on its drafts, and in part sent to its Eastern correspondent for credit to it. The judgment was affirmed. There was a suggestion that the cashier had misappropriated part of the money by purchasing property with it in his own name; but the Court said that the evidence supported the finding that the Bank of Lakin had actually received the money borrowed, and

"If so, it would make no difference that its cashier had appropriated a part of the same to his own use. A principal can not receive and retain the benefit of a transaction, and at the same time deny the authority of the agent by whom it was consummated."

Similar applications of the rule for which we are now contending will be found in some of the cases cited under Propositions IV and V, *supra*, and also in the following:

Bank of Commerce v. *Bright*, 39 U. S. App. 483; 77 Fed. 949.

Chemical National Bank of Chicago v. *City Bank of Portage*, 156 Ill. 149.

Johnston-Fife Hat Co. v. *National Bank of Guthrie*, 4 Okla. 17.

Conn. River Savings Bank v. *Fiske*, 60 N. H. 363.

Thompson v. *Bell*, 10 Exch. 10.

Burke v. *M. L. S. & W. Ry. Co.*, 83 Wisc. 410.

Dittey v. *Dominion Nat. Bank*, 43 U. S. App. 613; 75 Fed. 769.

We submit, therefore, that upon any view which can be taken of this case, the liability of the Fidelity National Bank is clear. The money of the Chemical Bank was ac-

tually credited to it, and has been actually applied by it to the payment of its acknowledged debts. This being so, it must account for what it has thus received. Nor does it matter what other moneys any of its officers may have stolen.

VII. THE WESTERN NATIONAL BANK CASE DISTINGUISHED.

Having now argued the various grounds upon which the liability of the Fidelity Bank for the money loaned to it and applied to its use by the Chemical Bank should be sustained, we are prepared to consider more intelligently than at an earlier stage of the argument the difference between the case at bar and that of the *Western National Bank* v. *Armstrong*, 152 U. S. 346. Our opponents will, of course, contend, as they did in the courts below, that this case is controlled by the opinion in that. We submit that this is not so because:

(*a*.) The cases differ materially in their facts.

(*b*.) The *dicta* in that case, supposed to be adverse to the Chemical Bank in this, rest upon a mistaken assumption of fact.

Differences in Facts.—These differences, which we have noted by comparing the records in the two cases, are as follows:

(1) There, up to the inception of the transaction, while there had been solicitation by the Fidelity Bank, there had been no business relations between the two banks; and when the money was credited the only prior transaction had been the remitting from New York of a small claim for collection. Here, the Fidelity Bank had long had a deposit account with the Chemical Bank; each bank had collected for the other; the Chemical Bank was one of the

reserve agents of the Fidelity Bank; and some similar transaction had previously been proposed (Rec., p. 22).

(2) There, Harper, in requesting the loan, did not ask it on behalf of his bank in terms, nor (as held by the Court below, though this Court did not pass upon this question) by implication. Here, the request was expressly made on behalf of the Fidelity Bank by Harper as its vice-president, and his action was confirmed by Baldwin as its cashier.

(3) There, the loan was on time—four months. Here, it was on demand.

(4) There, no obligation of the Fidelity Bank was transmitted with the request. Here, its certificate of deposit, signed by its cashier, was sent for credit.

(5) There, the record contained no evidence as to the scope of the powers usually exercised in the matter of borrowing money by officers of banks. Here, the record contains abundant and undisputed evidence that loans were always made on request of any active executive officer of the borrowing bank, including the vice-president and cashier, without showing authorization or ratification by its board of directors.

(6) There, the record was silent as to the powers exercised by Harper other than that he was vice-president and managing officer, *i. e.*, the general manager of the business of the bank. Here, the record shows in brief that he was permitted by the board of directors to manage the bank as he saw fit.

(7) There, all the letters from Cincinnati were signed by Harper individually; the letters from New York were addressed to Harper as vice-president. Here, the correspondence from Cincinnati relating specifically to the loan consisted of three letters signed by Harper as vice-president (one of which inclosed a certificate of deposit signed

by Baldwin as cashier), and one telegram signed Fidelity National Bank; from New York, one letter addressed to Baldwin, cashier.

(8) There, Harper purloined $195,000 of the identical credit given, through false drafts on the Western Bank issued after receiving advice by mail of the granting of the loan. Here, Harper did not touch the credit given at all; on the contrary, he took credit on the books of the Fidelity Bank on March 2, 1887, before he knew the Chemical Bank would grant the loan; his embezzlement, if he did embezzle, would have been just as complete and effective if the Chemical Bank had never granted the loan.

(9) There, the loan actually made was drawn out, so far as drawn at all, by false drafts not appearing on the books of the Fidelity Bank. Here, every penny loaned was drawn out by regular drafts appearing upon those books, and thus satisfying unquestioned obligations of the Fidelity Bank.

(10) There, the only account transmitted by the Western Bank was for the month of May, before the drafts were drawn; and while it showed a credit of $200,000, it said nothing as to a loan. Here, the account current for March sent from the Chemical Bank showed this credit expressly as a "Tem. Loan," *i. e.*, temporary loan, under date of March 2; it showed the drafts against the account including this credit; and further, that in spite of this credit the Fidelity Bank by April 1 had made an over-draft amounting to $32,695.97.

(11) There, the account current of the Western Bank which showed the credit, but *did not* specify it as a loan, was not audited by the bookkeeper of the Fidelity Bank, for he had no account with that bank on his books, but was taken by him to Harper, who kept it as a private matter of his own; thus it never got among the files and

papers of the Fidelity Bank. Here, the March account which showed the credit, and *did* specify it as a loan, was audited by the bookkeeper of the Fidelity Bank, found to be O. K., and filed with its papers; as the drafts charged to the Fidelity Bank appeared upon the face of the account, and agreed with the books of that bank, and as the balance was an over-draft by it, necessarily every cent with which it was credited upon that account, including this loan, had then been applied to its use; and whatever else Harper may have done he did not embezzle any part of this money.

(12) There, no usage had grown up between the banks as to such accounts, for this was the first of its kind. Here, there was such a usage by which the Fidelity Bank was required to note and report differences, with request for explanation as to matters not understood. No inquiry or allusion as to this loan was ever made by the Fidelity Bank, although it continued in business more than two months after receiving the account advising the loan, and although it made inquiry as to other matters appearing in that account. (Quinlan's answer of May 11, 1887, Rec., p. 269.)

(13) There, the position of the Western Bank was in no way altered by any action or non-action of the Fidelity Bank; the first two drafts were paid on June 3 and 4, before the account could have been returned audited; and the last draft was not paid until June 17, after the enlightening letters of June 9 and 13 had been received. Here, the position of the Chemical Bank was materially changed. Not only was recourse against Harper, who was then in good credit, lost, but The Jung Brewing Company note for $10,000 of the first collateral had been given back without substitution after the usual time for the report upon the account current for March had expired; on May

23 an exchange of collateral was made; the regular business between the banks continued; monthly accounts were rendered, compared and advised upon; in June a further advance was made by loan and over-draft, amounting to more than $300,000; and the Chemical Bank has given up the June collateral and collections, which it could not hold to secure the March loan, but might for the over-draft resulting from repudiating that loan.

(14) There, no evidence was offered tending to show ratification by the receiver or creditors or stockholders of the Fidelity Bank. Here, such ratification is established not merely by their long acquiescence, and the direct acknowledgment of the receiver of the existence of the loan, but by their pursuing and recovering from the directors for suffering the loan to be made.

To sum up these differences in a few words, they are as follows:

(*a*) There, no evidence appeared to show a loan was authorized. Here, such evidence does appear.

(*b*) There, it appeared affirmatively that the Fidelity Bank did not get the actual benefit of the money loaned. Here, it appears affirmatively that it did get that benefit.

(*c*) There, there was no evidence of ratification. Here, there is abundant evidence of it.

(*d*) There, the result reached was correct, for the reason assigned by the Court below—that the request, on its face, was not for a loan to the Fidelity Bank, but for a discount for E. L. Harper. Here, Harper individually had no apparent connection with the transaction requested.

With such differences as these existing, we submit no justification can be found for a claim that the decision in the *Western National Bank* case is controlling here.

Dicta rest on mistaken assumption.—The following quotations from *Western National Bank* v. *Armstrong*, 152 U. S. 346, 350, give fairly, we think, the essential parts of that opinion bearing upon the power to borrow money:

"There is no evidence whatever that the board of directors of the Fidelity National Bank gave any authority to Harper to borrow money on behalf of the bank, much less to borrow so enormous a sum on so long a time." . . . "The most that can be claimed in this case is that Harper acted as the principal executive officer of the bank. It can not be pretended that, as such, he had power, without authority from the board, to bind the bank by borrowing $200,000 at four months time.

"It might even be questioned whether such a transaction would be within the power of the board of directors."

The Court then quotes from the eighth section of the National Banking Act (Rev. Stat., sec. 5136, par. 7), and continues:

"The power to borrow money or to give notes is not expressly given by the act. The business of the bank is to lend, not to borrow, money; to discount the notes of others, not to get its own notes discounted."

Then, after quoting from *First National Bank* v. *National Exchange Bank*, 92 U. S. 122, 127, a passage included in that we have quoted *supra*, p. 86, showing that by necessary implication a bank has power to incur liabilities in the regular course of its business, the Court continues:

"Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money.

"Even, therefore, if it be conceded that it was within

the power of the board of directors of the Fidelity National Bank to borrow $200,000 on time, it is yet obvious that the vice-president, however general his powers, could not exercise such a power unless specially authorized so to do, and it is equally as obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers."

The conclusion thus reached by the Court rests, it will be seen, entirely upon the premise stated by it, that: "The business of the bank is to lend, not to borrow money; to discount the notes of others, not to get its own notes discounted." Upon this foundation is built the superstructure, first, that the temporary borrowing of money is "out of the course of ordinary and legitimate banking;" and, secondly, that special authority is essential to validate such a loan. If the major premise, the foundation of the argument, be unsound, the whole structure falls.

This premise is manifestly a statement of fact. Such statements are conclusive only as to the particular case in which they were made. However positively asserted, they are never more than persuasive in other cases; they can not be conclusive upon even the same tribunal in such manner as to prevent it from seeing a manifest error disclosed by further illumination of the subject. Witness the decisions of this Court in *The Genessee Chief*, 12 How. 443, and *Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S. 601.

As we have said, what is embraced in the business of banking is a question of fact, not of law. Its solution depends upon the usage of bankers, what they are habitually or commonly accustomed to do. This is different from the question as to what may be the powers of any particular bank. The latter will depend upon whether the bank be created by statute, or by private agreement between individuals, or be the property of but one person, and will

involve questions of law as to the interpretation of such statute or agreement. But *the banking business* means the business transacted by banks generally, no matter how created; and what that business is, depends simply and solely upon what banks are accustomed to do. Whether any particular bank can do every thing germane to the banking business, depends upon the charter or other constating instrument creating that bank.

It will be observed that this Court in the *Western National Bank* case does not find any limitations upon the borrowing power imposed in terms or by implication by the National Banking Act. It rests its conclusion solely upon the ground that borrowing is not incident to the banking business, or to use the words of the Court, is "out of the course of ordinary and legitimate banking." This is simply and purely a question of fact. Its existence is not affected nor conclusively disproved by a statement in the opinion of any Court, no matter how weighty or deserving of respect the pronouncements of that Court may be. One seeking to learn what is, in truth, within the course of ordinary and legitimate banking, will not rest with the assertion of any one man or any one tribunal, but will test that assertion by examining the nature of the business and the manner in which it is actually done; what history tells us as to how it has been done in the past; and what judicial opinions and legislation show us has been heretofore considered incidental, usual and necessary in that business.

From these sources of information we have garnered; and the fruits thus stored we have spread before the Court. It thus appears that from time immemorial borrowing has been a matter of course in banking, borrowing in all its forms; that it has been the uniform custom for one bank to lend to another on the application of either president, vice-

president, when actively engaged, or cashier of the borrowing bank; that when the power has been the subject of legislation, it has been either expressly granted, or plainly recognized by limiting its abuse; and that the Courts have held it to be incident to the banking business.

Considering that transactions like that at bar had been sustained by repeated decisions of the Court of Appeals of New York, where the lending bank was located, and by the Courts of last resort wherever else such questions had been submitted, and had been inferentially approved by the Supreme Court of Ohio, where the borrowing bank was located; and consequently that had the question of the validity of this loan been submitted to counsel for advice at the beginning of negotiations, the opinion, whether given by members of the bar of New York City, or of Cincinnati, must have been that the transaction was entirely regular, to hold now that such a loan was invalid will be more than a surprise. Such a ruling will extend far beyond the narrow circle, relatively, of the banking business, and will disturb the views that have hitherto been entertained in the whole field of corporate agencies. It will endanger and unsettle vast interests and obligations to an extent seldom worked by a judicial determination.

And if to this be added a further ruling that not only was the loan so beyond the scope of apparent authority as to require evidence of special authorization, but that upon the facts in the case at bar it never has been ratified nor applied to the use of the borrowing bank so as to make it liable therefor, and that the appellant, as receiver, may keep $300,000 of money loaned by the Chemical Bank in good faith and according to established usage, a custom and usage approved and confirmed by a long line of judicial decisions, then, we submit, that neither the business community,

nor the legal profession in advising business men, can say what landmark of the law can thereafter be considered immovable.

VIII. EFFECT OF COLLATERAL UPON BASIS FOR DIVIDENDS.

The recent decision of this Court in the case of *Merrill, Receiver*, v. *First National Bank of Jacksonville*, Nos. 54 and 55 upon the docket of the present term, relieves us from any discussion of the third, fourth and sixth assignments of error. That case was decided by the Court below upon the authority of the decision of the Court of Appeals in the case at bar. The arguments there, so far as this question was concerned, were by counsel now before the Court. The Court has expressly approved the reasoning and the conclusion reached upon this question by the Circuit Court of Appeals in the case at bar. In view of these facts we do not consider ourselves at liberty, without invitation from the Court, to discuss again matters so recently argued by our opponents as well as by ourselves, and so thoroughly considered by the Court. The decision there made by this Court,—that dividends must be declared upon the amount due upon the claim as it stood at the date of the declared insolvency of the failing bank, without regard to what collateral security the creditor may then have held except so far as necessary to show when his claim is paid in full,—not only relieves us from discussing, as we did in that case, which of the four rules for distribution of assets should be applied to an insolvent national bank, but renders it needless for us to debate other questions which might have been pertinent had the Court held that any of the other rules than the one adopted should be applied, and from urging here, as we did below, that under any of

the other rules the result reached in this case would have been substantially the same, because the collaterals which were collected before proof of claim were not the property of the Fidelity Bank, and were used by Harper in breach of trust, so that the debtor thereon would himself have had a right of action against the Fidelity Bank in so far as he might be compelled to pay the same to the exoneration of that bank; and for the same reason, if we admit that part of that collateral was lost through negligence, this negligence caused no damage to the Fidelity Bank.

IX. INTEREST ON DIVIDENDS.

It has been settled that where a claim against an insolvent national bank has been disputed by its receiver and is afterward judicially established, the claimant is entitled to interest upon the dividends declared in the meantime from the date of their declaration. *Armstrong* v. *American Exchange Bank*, 133 U. S. 433. As the statutes direct no form in which claims must be proved upon presentation to the receiver, but merely require him to pay ratable dividends "on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction" (Rev. Stat., sec. 5236), we had supposed that any form of presentation which acquainted the receiver with the existence of the claim was sufficient unless he demanded further particulars; that the object of the statute was to enable the receiver to determine approximately the amount of the claims that existed, so that in declaring dividends he might have regard not merely to the claims which were established to his satisfaction, but to those which might be established against his will, and thus to secure equal treatment ultimately for all. Hence, as Armstrong, the receiver, was advised of the existence of this

claim as early as July 6, 1887, if not before (Rec., p. 268), and as, in his letter of November 14, 1887 (Rec., p. 24), Armstrong, being then fully advised as to the facts, did not dispute the validity of the claim, but only the right of the Chemical Bank to pay it from the proceeds of the June collateral, we had contended in the Court below that the Chemical Bank was entitled to interest upon dividends from the date of their declaration respectively, although it had made no formal proof of its claim until 1890 because it believed until that time that it had a right to apply the June, as well as the March, collateral to the claim, and that in that way it had received payment in full. The Court below, however, held formal proof of claim was necessary to start interest upon dividends, and that the Chemical Bank, as to dividends declared before it filed such formal proof in April, 1890, could receive interest only from that date. That bank has taken no appeal from this decision, so the matter is not open here for debate. We state it only to advise the Court as to the discussion below.

Our opponents contend, however, that the answer of Armstrong (Rec., p. 101) to the Chemical Bank's proof of claim precludes that bank from receiving interest upon dividends on $200,000 of its claim.

The Chemical Bank refused to accept the proposal made in that answer because its counsel thought the proposal hazardous, in that its acceptance would have involved splitting an entire claim, and in effect putting part of it into judgment (*National Bank of Commonwealth* v. *Mechanics' National Bank*, 94 U. S. 437), and thus giving persons having opposing rights the opportunity to say that the balance of the claim was waived,—making the very argument which was made by one of our opponents in *Merrill* v. *National Bank of Jacksonville*, No. 54 of the docket of this Court at this term (see pp. 7 and 8 of Mr. Oldham's brief

in that case); and that the proposal was unfair, not only in that it involved a promise of restitution which the receiver had no right to require, but a further promise that if the Court should hold that the dividends should be computed according to the *Kellock's* case rule (to give these rules the names that were used in the argument of the *Merrill* case just mentioned), yet settlement should be made as if the bankruptcy rule were the one to be applied. And when this cause was heard in the Court below, we urged not only these matters, and that the offer was not in itself such a tender as could stop the rights of the appellee to interest, but that when the amended answer was filed and the validity of the claim *in toto* was attacked, the offer was necessarily withdrawn and lost whatever force it might otherwise have had; and we suggested that if the Court were not satisfied with the correctness of this last position, should they determine to remand the cause for the purpose of taking additional evidence as to the validity of the loan, they should also permit evidence to be taken as to the negotiations between the parties with reference to this subject.

The Court below held that our position as to the effect of filing the amended answer, and thus attacking the validity of the loan, was well taken, saying (31 U. S. App. 65, 82):

"We quite agree with counsel for the Chemical Bank that the raising of such an issue must be considered to be a withdrawal of the previous offer by the receiver, and therefore that the offer can not now be used as a ground for refusing the payment of interest upon dividends upon the whole claim for the period after April 25, 1890, when the claim was presented and rejected, down to the time when such dividends shall be paid."

In view of this we consider it hardly fair to suggest,

as do our opponents (their Brief, p. 108), that the Chemical Bank made no answer to Armstrong's offer, nor attempt to remove any obscurities in its language. As a matter of legal duty or moral obligation, we do not suppose our client was called upon to give other answer than the record shows. But however that may be, it is very certain that there was no occasion to introduce into the record proof as to what action was taken when we see that after an allegation of this offer had been made in the original answer (Rec., pp. 11–12), coupled with a practical admission of the validity of the claim, this allegation and admission were both suppressed in the amended answer, and issue taken there upon the validity of the loan (Rec., pp. 17–20).

Counsel for the appellant in effect urge that the Court should relieve him from the consequences of the election he thus made at the beginning of the litigation, and should guess what would have been the length of the litigation if he had continued upon the line of defense suggested in his original answer, and to deny the appellee interest for that period. The statement of such a claim is, we submit, its sufficient refutation. Never before, we suppose, was it seriously contended that a conditional offer to pay *part* of a valid claim must be accepted under penalty of losing interest upon the part included within the offer. And when to such a contention—for that is all Armstrong's offer to pay dividends amounted to—is added another, that such an offer remains effective to stop interest even after the validity of the whole claim is denied, then it stretches credulity to suppose that the contention is seriously made.

X. REVIEW OF BRIEF FOR APPELLANT.

We have been compelled to postpone discussion of our opponents' brief upon the merits of the case till this time, as we did not receive it until our own had been completed up to page 161 *supra*, and partly printed.

The second and third heads of their brief, contained in pages 53–107, which discuss the basis for dividends, and were, as we understand, prepared and printed before the decision of this Court in *Merrill* v. *National Bank of Jacksonville*, No. 54 upon the docket of this term, was announced, require no comment from us, for the reason we have stated *supra*, page 161. The argument by them made is substantially the argument presented by the same counsel in the Merrill case, and is answered by the decision in that case.

While we think we have anticipated substantially all of their argument as to the liability of the Fidelity Bank, we trust we may be pardoned for adding to this brief, already unusually lengthy, some words of comment upon matters they have presented and authorities they have cited.

In the first place there are some errors in statements of fact to which attention should be called.

On page 4 they say that on February 28, 1887, "E. L. Harper did not have $300,000 to his credit in the [Fidelity] bank, and he had not deposited that sum, or any part of it, as the basis of such a certificate," and, on page 17, they repeat the statement that he had deposited no money as a basis for the certificate. The evidence does not establish these facts. All that there is directly upon the subject is in question 27 to J. Harry Watters and his answer (Rec., p. 74):

"Q. 27. What paper or obligations, if any thing, was given by Mr. Harper to the Fidelity National Bank at that time? A. There is none that I know of."

This is not proof that at that time Harper did not have more than $300,000 to his credit upon the books of the bank.

At the bottom of page 25 they suggest that Harper's activity in the management of the Fidelity Bank was entirely unknown to the Chemical Bank, so far as the testimony discloses. Considering that the dealings between those banks had begun with the birth of the Fidelity Bank, and that Harper's dominating sway had begun at the same time, as this record shows, we submit that the proof is amply sufficient to raise the presumption that the Chemical Bank was well acquainted with the fact that he was at least an *active* officer. And his own correspondence with that bank furnishes confirmation.

On page 48 it is intimated that Harper may have had telegraphic information on March 2d that the Fidelity Bank had granted the loan. There is no warrant in the record or elsewhere for this supposition. The only information given by the Chemical Bank upon this subject at that time was its letter of that date.

On p. 10 our opponents say (*italics* theirs): "The Chemical Bank knew, as admitted by its president and its cashier, that E. L. Harper had *not* deposited $300,000 in the Fidelity." At the bottom of p. 14 they say that as both of these officers "knew exactly what the certificate of deposit meant, it has no legal significance in this case." And on p. 17 they contend that these officers must have known that the certificate was irregularly issued and stated an untruth; and having been issued merely for the

purpose of borrowing money that they must be charged with notice of the subsequent use of the money obtained by the use of the certificate. The claim of counsel attributes more knowledge to the officers of the Chemical Bank and charges them with more admissions than the record warrants. It is true that those officers, as well as others, say that certificates of deposit are very commonly forwarded with applications for loans; and that it is also common in such cases to issue such certificates without there being a real deposit to support them. But these facts alone are not sufficient to charge the officers of a lending bank with notice that any particular certificate does not represent a real transaction. The certificate is a negotiable instrument, and with reference to it, as to all other instruments of its class, to charge a purchaser with knowledge of facts impeaching its validity it is not sufficient to show that he knew matters which should have made him suspicious; where the instrument is regular upon its face, the proof must go farther and show actual knowledge of the invalidity. *Goodman* v. *Simonds*, 20 Howard, 343. With reference to certificates of deposit received under such circumstances as this one was, the testimony of the officers is that when such documents are presented to them, they know nothing as to the facts with reference to their issue; they take the instruments at their face for what they represent, and know nothing as to what occurs at the other end (Rec., p. 44, XQ. 156; p. 126, XQQ. 17–18; p. 133, XQ. 25). This they are justified in doing for the reasons just mentioned. Indeed from a banker's point of view, there is nothing irregular or suspicious in a certificate of deposit sent with an application for a loan. This will be apparent upon reading the testimony of the bankers who uniformily speak of such a document as being one of the customary evidences given in effecting a loan. Presump-

tively, therefore, it is not an irregular instrument, but one duly authorized. Whether consideration were given for it or not by the person in whose favor it is drawn is purely a matter of form. If he made such a deposit, he has lent his money to the bank, and also his credit, by allowing them to use the voucher they gave him. If he deposited no money, then the certificate is but the equivalent of the note of the bank upon which he is an accommodation endorser.

The further contention above mentioned, that the Chemical Bank, having knowledge that the certificate was issued merely for the purpose of borrowing money, must be charged with notice of the subsequent use of that money, presents a clear case of *non sequitur*. Knowledge that money was being borrowed would not carry with it notice of the use subsequently to be made of that money. We may add, however, that the Chemical Bank in fact did see to the subsequent application of the money which was borrowed, paid it out only upon checks of the Fidelity Bank, and reported these payments; and that each payment so reported was confirmed as authorized.

The case of *Farmers' & Merchants' National Bank* v. *Smith*, 23 C. C. A. 80, which our opponents have cited in this connection, lends them no support, but on the contrary is adverse to their views. The ground upon which that case was decided was that the act done was *ultra vires* as to the bank itself, and therefore necessarily beyond the apparent scope of the authority of one of its officers. The reasoning concedes that had the act been within the power of the bank, it would have been bound. The case is officially reported in 40 U. S. App. 690.

It is suggested that the witnesses as to custom were from lending banks only, and that they were indifferent as to authority as they took collateral to make them

safe; and further, that even they said it would be improper for the executive officer to effect the loan without conferring with his directors (Brief, pp. 19–24). The answer to this argument was very satisfactorily given by the Court below (Rec., pp. 344–345).

But in addition we may add with reference to the suggestion as to the collateral, that it is the habit of banks to take collateral to secure loans whether the loan be to an individual or to a corresponding bank. The argument of our opponents necessarily concedes that the lending bank would acquire good title to the securities pledged as collateral, and could indemnify itself out of them without regard to the responsiblility or the legal liability of the borrowing bank for the loan as an obligation. Thjs concedes the whole ground so far as the pledged collaterals were assets of the borrowing bank. The same agent who could *give a valid pledge* of them to raise money can *promise to repay* the money; and it is difficult, if not impossible, to see how the debtor bank can be any more injured by holding it directly liable for repayment than by holding that its assets may be devoted to such repayment by the pledgee.

Further, this whole argument as to custom shows a complete misapprehension of the nature of the question to be answered. That question is, not what is the custom in the internal management of the borrowing bank, but what authority does custom require the officers of the borrowing bank to show to the lending bank; in other words, what by custom is the apparent scope of authority of a bank officer. It is no answer to this to show what real authority a bank officer should get before he attempts to exercise his apparent authority. Of course no honorable bank officer would borrow money for his bank without first consulting his board of directors, where such consultation was practicable. But whether, having obtained their ap-

proval, he is required to communicate that approval to the lender, or the lender is required to demand proof of it, is a very different matter, and is the very matter with which we are now concerned. To repeat, the focus of observation is not the office of the Fidelity Bank in Cincinnati, but of the Chemical Bank in New York; and the question is, whether, upon the information submitted to it, that bank, by the custom of bankers, was justified in believing the request made to it for a loan to be authorized. To that question but one answer can be given.

It is suggested (Brief, p. 25) that such a custom was illegal in its inception, and can not become legal through age. Surely this claim was inconsiderately made. No statute is referred to declaring the custom illegal. It was in vogue, as reported decisions show, long before the National Banking Act was passed. And that it is not unreasonable is shown by the fact that it is but the application to banks of a principle well established with reference to other corporations that have occasion to borrow money; and indeed is no more than the doctrine running through the whole law of agency, that whoever employs a general agent empowers him to do all things that such an agent generally does. To the query put by our opponents as to how banks are to protect themselves, we suggest that the remedy is for them to employ honest agents, put them under bond if need be, and if they do not do that, at least to watch the accounts of their correspondents. And if their agent deceives them, let them pay the loss rather than try and throw it upon another.

The argument made on p. 28, that the Chemical Bank in making the loan did not rely upon any apparent authority conferred by the directors, could have been made as well in any of the cases which we have cited upon that

proposition. This alone shows its fallacy. If the directors had exercised proper supervision and control, Harper would not have undertaken the things he did.

And even were there force in the argument, still it does not meet the other proposition that the neglect of the directors, their abdication in favor of Harper, was the cause why they did not discover what he had done. The Chemical Bank certainly did rely upon the effectiveness of the notice it had given that it had made the loan as requested; and because of this reliance, and upon the faith of it, it paid drafts, exchanged securities, and made further advances, which it never would have done had Harper's acts not been suffered to appear as those of his bank.

The whole argument of our opponents upon the subject of ratification (Brief, p. 29, *et seq.*) is based upon the fundamental misconception that *actual* knowledge of the material facts must be brought home to the directors. Such is not the law; for while it is commonly said that there can be no ratification without knowledge, yet this is always with the qualification implied, if not expressed, that notice, which if pursued would lead to knowledge, is equivalent to knowledge, and that it is sufficient if this notice be given to an agent while in the conduct of his principal's business. Neither Mr. Meacham nor Mr. Morse is gifted with the superhuman faculty of expressing every thing relating to the subject in one phrase. What they say in the sections quoted on pages 32 and 33 of our opponent's brief is to be taken in connection with what they say elsewhere as to the effect of notice to an agent; see Meacham on Agency, secs. 718, 731, and Morse on Banking (3d ed.), secs. 98(k), 107.

There is nothing in any of the decisions which have been cited by our opponents which is either inconsistent with

this proposition, or with any part of the argument we have made. In some of them the principal having authorized his agent to do a specific thing, and no more, the agent has undertaken to make a collateral contract; and it has been held that the principal who receives and retains the proceeds of the transaction which he has authorized, without notice of the collateral contract, is not bound thereby. We do not dispute this proposition; the making of the collateral contract was not within the apparent scope of authority of the agent; and in receiving from the agent what he did receive, the principal was receiving only what he had a right to expect to receive under the authority previously given to the agent. The distinction between such cases and that at bar is carefully pointed out in the opinion in *Smith* v. *Tracy*, 36 N. Y. 79, 82–84, which is one of the cases of this class cited by our opponents. Another is *Wheeler* v. *N. W. Sleigh Co.*, 39 Fed. 347.

Another class of cases cited by them is where an agent, having made an unauthorized transaction in his principal's name, pays over the proceeds to his principal upon an indebtedness of his own to the principal—the latter receiving them without knowledge or notice of the real consideration moving to the agent. And it is held that the principal who receives money from his agent in settlement of a known existing liability is not chargeable with knowledge of any fraud committed by the agent in obtaining the money. Within this class fall *Thatcher* v. *Pray*, 113 Mass. 291; *Baldwin* v. *Burrows*, 47 N. Y. 199; *Bohart* v. *Oberne*, 36 Kan. 284. These cases are altogether different from that at bar. There the transactions between the agent and the principal were actual transactions, the agent in person dealing with the principal in person, or with some other representative of the principal. Here the only transactions between Harper and his principal, connected in any way with the case at bar,

were by and through Harper only; that is to say, Harper individually dealt with Harper as agent for the Fidelity Bank. The difference between the two classes of cases is pointed out in the very thoroughly considered opinion in *Atlantic Mills* v. *Indian Orchard Mills*, 147 Mass. 268.

Another class of cases cited by our opponents is only to the effect that the burden of proof to show knowledge or notice requisite to ratification is upon the person claiming ratification. Within this class fall *Combs* v. *Scott*, 12 Allen, 493, and *Murray* v. *Nelson Lumber Co.*, 143 Mass. 250. While the authorities are not unanimous upon this as a proposition of universal application (see *Patterson* v. *Robinson*, 116 N. Y. 193), yet we have no quarrel with it here. The cases cited in its support only tend to show that no duty rests upon the principal having no notice of irregularity to inquire whether there was irregularity; they in no way tend to show that a principal, who through himself, or his agent, has notice of an unauthorized act of which he is reaping the benefit, can use the crop without being chargeable with all the knowledge which pursuit of the notice would bring him.

First National Bank v. *Hanover Bank*, 66 Fed. 34, and *State National Bank* v. *Newton National Bank*, 66 Fed. 694, cited by our opponents, were cases where an agent having contracted a debt upon his own responsibility, assumed in the name of his principal to guarantee the payment of it. They fall within the principles settled by *West St. Louis Savings Bank* v. *Shawnee County Bank*, 95 U. S. 557. No one lending money to an agent, or dealing with an agent on his own individual account, can safely trust his representation that he can pledge his principal's credit in the transaction. But that is not the case at bar; those cases would have been applicable to this if the loan here had been made to Harper individually upon his individual re-

sponsibility, although the proceeds were credited to the Fidelity Bank. But the loan was not so made, nor was there any pretense that the Chemical Bank gave credit to Harper as an individual.

Schutz v. *Jordan*, 32 Fed. 55, was decided simply on a question of pleading, viz.; that the suit was for goods sold and delivered. The Court expresses no opinion as what would have been the result had the suit been in trover for conversion, or in *assumpsit* for money had and received.

In the *Phosphate of Lime Co.* v. *Greene*, L. R. 7 C. P. 55, so far from its being held, as one might suppose from reading the quotations in our opponent's brief (p. 35), that actual knowledge in the principal—if an individual, or in its immediate representatives—if a corporation, was necessary, the decision was that the notice which was given to those representatives was sufficient to carry with it knowledge, because it suggested an inquiry which would have led to knowledge. In other words, the statement in an account furnished stockholders that certain shares of the stock of the company were in its name as "Shares forfeited for non-payment of calls," was sufficient to impute to those stockholders, assembled in corporate meeting, knowledge that those shares had been received from promoters in compromise of a liability of the promoters to the company for borrowed money.

We have already (*supra*, p. 136) referred to *American Surety Co.* v. *Pauly*, 170 U. S. 133, and there is nothing in that case inconsistent with our contention. It presented a totally different state of facts and called for a different rule of law.

Our opponents in discussing the notice given by the account current for April (Brief, pp. 42–45), are compelled

to urge that one who receives an account is obliged to notice only the charges against him, and may disregard the credits given him. This is, truly, a novel theory, and shows the straits to which they are reduced. In brief, it is that one who receives information telling him his own books are falsely kept may safely disregard that information. Surely, such a claim needs no argument to refute it; and if it were necessary to refer to authority, *Kissam* v. *Anderson*, 145 U. S. 435, and *Marsh* v. *Keating*, 2 C. & P. 250, were both cases where, as in this, the notice was given by an entry upon the credit side of the account.

Our opponents also ignore the significance of the reconcilement sheets and correspondence after the receipt of the account for March. As we have stated, these show that other matters in the March account, were the subject of correction; and this was proof of the strongest nature to the Chemical Bank that this particular entry was approved and confirmed. Whether these letters and accounts were matters which would ordinarily have been submitted to the inspection of the directors, had they indicated nothing irregular, is not, as our opponents seem to think, the real question at issue; but whether they *should* have been submitted to the directors, since they *did* indicate irregularities. The directors put their subordinates in office and devolved part of their own duties upon them. By so doing, they make the bank responsible for the neglect of their subordinates; and they are fully chargeable with notice of what they would have learned had they been performing the duties which they cast upon their subordinates.

In discussing the question of ratification and our contention that the receiver ratified the loan by the Chemical Bank to the Fidelity Bank, counsel for appellant concede

that the receiver brought suit against the directors for having been

"negligent in attending to their duties, and in the continued employment of Harper. This it was his duty to do. He also named *the present alleged loan as one of his fraudulent acts*. That suit was not to recover from Harper *the amount of that loan* as having been paid to him. It was for *damages* growing out of his *fraudulent acts*, and could not in any way affirm and legalize what would otherwise be illegal. . . . The suit was for damages done to the bank by the negligence of the directors. This suit was compromised by the payment of $450,000, by the directors. . . . This damage was done to the bank whether this claim is a valid or an invalid one. In either case this act was a factor in bankrupting the bank and a subject for damages against the directors for placing Harper in the position which he occupied." (p. 47, *italics* ours.)

We have already argued that there could be no claim for damages because of the making of this loan unless by its making the loan became a liability; for without liability there was no damage. But these remarks of our opponents tempt us to a further discussion of this subject.

That negligence, as alleged in the bill, consisted in committing all power to Harper and allowing him to conduct and operate the bank without superintendence or control. It is impossible to see how their negligence, or the "fraudulent acts" of Harper in the matters now under review, could have damaged or injured the bank unless the bank was legally bound to repay to the Chemical Bank the loan made by it to the Fidelity Bank. If not so bound, it was quite sufficient that the Fidelity Bank, or the receiver as its successor and representative, should refuse payment. If that refusal be correct and be sustained by the courts, the bank was in no degree damaged.

But the receiver did not take this view of the situation. He goes into Court with an allegation of damage, and gives this loan as one of his items of damage. To simplify the matter, suppose this loan had been $450,000, and had been the only item of damage. The receiver gets the full amount from the directors, and if he succeeds in defending an action by the Chemical Bank to recover the loan, the result would be that not only would the Fidelity Bank have suffered no damage, but clearly the receiver would have made for the bank $450,000.

If the receiver's contention that the loan was unauthorized be well founded, he had his election to reject the claim and stand by his rejection, or to waive the alleged irregularity, concede the liability of the Fidelity Bank to the Chemical Bank, and sue Harper and his co-directors for damages caused to the Fidelity Bank by negligence and fraud. But he can not have both remedies. He has elected to ask for damages, and obtained them. That he secured them by compromise instead of judgment is wholly immaterial. The action for damages was an irrevocable election, and the amount paid was in satisfaction of the claim set up in the receiver's bill in equity.

In the receiver's bill of complaint against the directors, he charges that Harper converted to his own use "very large sums of *money belonging to said association*, . . . but he avers the aggregate amount thereof to be not less than the sum of $500,000," and that he and his co-defendants "did issue the drafts, bills of exchange and other *obligations* of said banking association," for which it received no consideration, and which they converted to their own use (Paragraph 21 of Bill, p. 284 of Record); and that Harper was allowed absolute control of the bank (Par. 20, p. 283, and Par. 23, pp. 284–285 of Record).

It is thus seen that in that suit the receiver charged

Harper with embezzling and converting to his own use *the money and assets of the association*, and it is admitted that one instance was the manipulation of the loan of the Chemical Bank to the Fidelity Bank.

He could not have converted to his own use the money of the Fidelity Bank unless the money belonged to the bank and not to him, nor did he embezzle the money of the Chemical Bank. The money could not have belonged to the Fidelity Bank unless the loan by the Chemical Bank vested title in the Fidelity Bank. When title vested in the borrower the obligation to repay attached.

The two remedies, repudiating the debt, and suing the directors for damages, are so palpably inconsistent that they can not co-exist for a moment.

It can not be said that the doctrine of election applies only as between two or more affirmative remedies, and not as between an active remedy and a decision not to recognize and pay a demand. The equity of the doctrine is the same in either case, the reasons for it just as strong. Moreover, the appellant is pursuing an affirmative remedy in this action. He seeks to recover $100,000 of the Chemical Bank. For the protection of appellant the decree of reversal, allowing either party to take additional testimony, was so framed, "That if the issue be decided in favor of the receiver, the bill should be dismissed, and a decree entered in favor of the receiver for the restitution of the $100,000 paid by the receiver July 25, 1892, to the Chemical National Bank on the faith of the decree below."

There has therefore been, by the bill against the directors: (1) A complete election, and (2) a complete admission of the liability of the Fidelity Bank, by the allegation of *ownership* of the funds, and *damage* by their abstraction. The Fidelity Bank could not have been the owner of the funds realized by the Chemical loan, nor damaged by the

embezzlement of those funds, unless it was legally bound to pay the loan.

In discussing Harper's fraudulent method of obtaining the ability personally to reap the benefit of the loan of $300,000 made to the Chemical Bank by the Fidelity Bank, counsel for appellant, in the course of describing it, say (p. 49): "The transfer of the funds to Harper was made in the regular mode of doing business. . . . This was no remarkable or unusual act of the vice-president of a bank." Then, after referring to the testimony of the witnesses as to the manner of making such transfers, they say again (p. 50): "There was nothing, therefore, unusual in this mode of transferring the funds." Then, after referring to some cases upon which we have already commented, they continue (p. 51): "The proceeds were placed to its credit by the Chemical; by transfer of funds the proceeds were credited to Harper and then checked out of the Chemical in the regular course of business; . . . It is true that the Chemical had no knowledge of the entries made on the Fidelity books nor of the frauds of Harper."

We have already called attention to the fact that the witnesses say that while the *form* by which Harper obtained the transfer of funds was regular, yet the *transaction* was obviously irregular upon his part; and while the clerks could properly obey him, yet by so doing they would not perform their whole duty; they should have gone farther, and have reported to another officer that Harper was thus taking credit without production of right to do so, and should have been particularly careful in examining the next account current from the bank against which Harper made the charge. With this comment upon what our opponents say as to the form of the transaction, we submit

that their concessions result in establishing the following propositions:

(1.) The transfer was the "regular mode" of doing such business. That is, the *form* of the act was correct, though the act itself is charged to be fraudulent.

(2.) The Chemical Bank had no control over the act, and no knowledge of it, nor of its fraudulent character.

(3.) It was "fraudulent," as between Harper and the Fidelity Bank, because it deprived the Fidelity Bank of property—money—which belonged to it.

(4.) The money belonging to the Fidelity Bank, because it had been loaned to that bank by the Chemical Bank.

(5.) Therefore there was an obligation to repay it.

(6.) "Damage" was caused by the fraud and the receiver elected to recover that damage, by the bill exhibited against the directors.

(7.) For all that appears in this record the payment by the directors has entirely indemnified the receiver.

(8.) If he has not been indemnified, and if the Fidelity Bank is still a loser by this transaction, and if we could separate the Fidelity, *as a bank*, from its fraudulent and negligent officers, and call it an *innocent* loser, then it is a case for the application of the rule, *that as between two innocent parties, where one of them must lose, that one shall bear the loss whose conduct has caused it, or has carelessly and negligently enabled its officers or agents to inflict the loss.*

It is stated on page 52 of our opponents' brief that if this loan had not been made by the Chemical Bank, Harper could not have obtained the money which he had credited to himself on the books of the Fidelity Bank. But counsel do not attempt to explain why he could not. There

is nothing in this record to lead one to suppose that Harper could not have done so; on the contrary, there is every reason to suppose that he could have done so. The credit to him was made upon his word only; and it stood upon his word, although when the account came in his word was given the lie. Clearly under any circumstances he could have obtained the credit in his own bank on his word merely, as he did obtain it, and beyond peradventure could have held it until the Chemical Bank's next account current came in. If his power extended thus far, who can say that he could not have covered his tracks in some other way so as to lull the bookkeeper to sleep when the account arrived.

Our opponents follow this assertion with another, that Harper would never have appropriated the money if the Chemical Bank had required a resolution of the board of directors to authorize the loan before making it. Here again we beg leave to say they are not speaking by the card. Either Baldwin, the cashier, was in league with Harper, or he was not. If he was not in league with him, then our opponents' case fails utterly, because of Baldwin's signature to the certificate of deposit, and the notice given to him by the letter sent by the Chemical Bank. If Baldwin was in league with Harper, then it can not be doubted that he would have manufactured copies of as many fictitious resolutions of the board of directors as circumstances required, and have attested them with the corporate seal; for with him as cashier rested the whole power of manufacturing the necessary evidence.

The final contention of our opponents, on pp. 52–53, illustrates the queer results that sometimes follow from driving the mind upon a path it is unwilling to pursue.

They claim to have convinced themselves that it makes no difference upon the merits of the case whether the persons guilty of actual negligence were the officers of the Chemical Bank or Harper's associates in the Fidelity Bank; and that in either case the Chemical Bank must stand the loss; they concede that in legal effect Harper's actions in the Fidelity Bank were not different from what they would have been had he reported to its board of directors that he had deposited to the credit of the Fidelity Bank $300,000 in the Chemical Bank, and wished them to give him the same amount from their own bank; and they, resting upon his word, had abstracted that amount of money in cash from the vaults of their bank and given it to him. That is to say, they contend that if an agent falsely tells his principal that he has established a credit for the principal with a third person, the principal may pay the supposed credit to the agent and recover it from the third person! The argument assumes that by some hocus pocus at Cincinnati, of which the Chemical Bank was and remained totally ignorant, the contract which it had made as it thought with the Fidelity Bank could be transferred so as to give that bank the full benefit of it but relieve it from all responsibility.

Surely rhetorical sophistry can not further go.

To conclude, the ultimate question presented by the case at bar is whether a principal, who acts only by agents, and who has been robbed by an agent, can throw his loss for that theft upon an innocent third party, and this, although that third party gave others of his agents information which, when coupled with knowledge they already had, advised them that such a theft had been committed, and although further the principal has, with full knowledge of the facts, compromised with his agents to his

satisfaction for the loss thus caused him. We submit that the correct answer to this question was given by the decree below, and that that decree should be affirmed.

WM. WORTHINGTON,
GEORGE H. YEAMAN,
GEORGE C. KOBBÉ,
Counsel for Appellee.